Centre for
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Queen's University
Kingston, Ontario

Foreign Investment Control in the Canadian Mineral Sector: Lessons from the Australian Experience

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Preface

The Foreign Investment Review Agency has been the focus of a great deal of criticism over the years of its operation, both from the economic nationalists who seek its protections, and from the foreign interests who wish to invest in Canada. This study takes an in-depth look at the philosophy behind control of foreign investment, particularly in the field of mineral industry investment, at the goals of such control, and at the effectiveness of the Canadian legislation and control agency in realizing these goals. Drawing on both theoretical analysis and practical experience in Canada and in Australia, the author proposes changes to the regulation of foreign investment control in the mineral sector that are designed to both protect the national interest and satisfy the concerns of foreign investors concerning the principles and administration of foreign investment control in Canada.

The Centre for Resource Studies is pleased to present this work, in the hope that it will lead to a better understanding of the Foreign Investment Review Act and its administrative agency, FIRA, and contribute to policy and program revisions that will be in the best interests of foreign investors, the mineral industry, and Canadian society.

The views presented are those of the author, and do not necessarily represent the opinions of the Centre for Resource Studies or its sponsors.

Brian W. Mackenzie
Interim Executive Director
Centre for Resource Studies

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Foreword

The impetus for undertaking this study was provided by the 1981 press coverage of the hostility displayed by many foreign investors and their home governments towards Canada's foreign direct investment (FDI) policies. The nature and intensity of the criticism caused me to reflect upon research that I had previously carried out at the Centre for Resource and Environmental Studies (CRES), Australian National University.

In particular, I was struck by the differences in the perceptions of the international financial community, which appeared to regard the Australian system favourably and the Canadian system unfavourably, in spite of the fact that the two regimes were based upon similar objectives, legislation, and bureaucratic structures. In fact, it was my initial impression that the Australian system was more extensive and, in places, more rigorous, in the evaluation of FDI in the mineral sector, than its Canadian counterpart. And yet, the Australian control regime appears to enjoy strong domestic and external support — the opposite of Canada's experience.

It was towards explaining this apparent paradox that I turned my efforts. However, I would not have been able to do so without the assistance of many people. First, I wish to thank Brian Mackenzie and Margot Wojciechowski of the Centre for Resource Studies for encouragement, advice and the arrangement of the necessary financial support to facilitate this study. Second, a significant debt is owed to the numerous individuals from industry, government, and academe, both in Canada and Australia, who gave generously of their time. Unfortunately, space limitations, and in some instances their desire for anonymity, restrict my ability to mention individual contributors. Nevertheless, special thanks must go Professor Stuart Harris, Director, Centre for Resource and Environmental Studies, Australian National University, for his insightful comments and efforts in arranging for me to meet relevant policy-makers during my sojourns in Australia. Similarly, Dean M.R. Hutchings, Faculty of Administration, University of Regina, generously agreed to rearrange my teaching schedule so as to facilitate early completion of the study. In addition, the following

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Summary

This study contrasts the Australian and Canadian approaches towards the regulation of foreign direct investment (FDI) in their respective non-petroleum mineral sectors. The rationale for the study is straightforward: despite similar socio-economic, political and demographic environments, and despite an FDI/mineral sector regulatory regime that is in many ways more restrictive than its Canadian counterpart, the Australian regulatory apparatus has been largely accepted by the relevant national and international interest groups. In contrast, the Canadian Foreign Investment Review Act (FIR Act) and the Foreign Investment Review Agency (FIRA) have been the source of widespread domestic and external criticism.

The Australian scheme, with respect to mineral activities, is characterized by the following elements. First, it utilizes a sector-specific set of rules within a general screening mechanism. That is, in addition to satisfying the condition that the venture is 'not contrary to the national interest', each major mining project must normally satisfy the requirement that, either at the time of approval or prior to the commencement of commercial production, it possesses a minimum 50-percent Australian equity, together with Australian residents comprising at least 50 percent of the voting strength on the board or controlling body of the project. These conditions are denoted as the '50/50 rule'.

Second, the current guidelines and legislation treat mineral leases as business enterprises; this results in all such acquisitions by foreign interests being subject to review. In practice, approval is automatically granted on the understanding that all subsequent development must meet the 50/50 rule described above.

In addition, the Australian system utilizes an innovative transitional device, known as the naturalization scheme, whereby established foreign owned and controlled firms agree to move towards Australian ownership, and hence are deemed to have met the government's 50/50 rule with respect to new project development.

This system appears to have worked rather well, especially if one believes that FDI policy should be directed towards the issue of ownership rather than control. By world standards, the Australian mineral in-

dustry prospered during the 1976-82 period. It is interesting that during this time period all new black coal projects receiving approval, either initially or prior to the commencement of commercial production, met the 50/50 guidelines. Similar results were found to apply to all new mineral projects initiated after June 1979.

In contrast, the Canadian regulatory regime has been the subject of much criticism. Although procedural and personnel changes have taken place since mid-1982, the basic structure remains as it was introduced in 1974. This requires a foreign interest acquiring a mineral related business or attempting to establish a new business enterprise to demonstrate that such ventures will yield significant economic benefits to Canada. It is shown that the criteria employed are open-ended and ill-defined; that a protracted bargaining system serves as the focal point of the control process; and that the resulting contractual agreements, called undertakings, are frequently a major source of irritation to applicants.

These undertakings are used, among other things, to restrict the future development and terms of resale of individual projects in which the applicant has acquired a beneficial interest. In this way the minister responsible for the FIR Act and FIRA may move towards the government's stated objective of 50 to 60 percent Canadian ownership of all major resource projects. The need for such controversial tactics is due to the fact that the legislative base of the review process is the individual business entity; once approved, it may operate indefinitely without ever again subjecting itself to the review process as long as it confines its operations to related business activities. Unfortunately, the government's resource ownership objective is specified in terms of individual projects; hence, in order for FIRA to implement this implicit directive, it must employ the rather suspect approach of limiting future corporate project activities through the use of undertakings.

Although the Canadian system generates uncertainty and frustration on the part of foreign investors, it is shown that only a small subset of prospective mining projects actually comes under FDI review. This is attributable to the previously described phenomenon whereby a firm may expand in perpetuity, within related lines of business activity, without ever again being subject to review. Given the high level of foreign investment in Canada, this suggests that many Canadian-based entities, including most of the major international oil companies, are immune from the restrictive effects of the FIR Act with respect to related business initiatives. From an economic nationalist perspective, the problem is exacerbated by the fact that mineral lease acquisitions are not treated as business enterprises, and hence not reviewable, unless they are deemed to contain proven commercially-viable reserves.

In summary, the Canadian FDI/mineral sector regulatory regime covers only a small proportion of transactions initiated by foreign interests. Nevertheless, it has generated significant ill-will in the domestic and external financial community; at the same time, it has failed to satisfy the aspirations of the economic nationalists. The Australian system, in contrast, covers virtually all major mineral transactions but yet has been widely accepted by most of the relevant actors. It is for this reason that the author recommends that the Government of Canada give serious consideration to adopting some of the features of the Australian regulatory regime with reference to Canada's nonpetroleum mineral sector.

Résumé

Cette étude met en contraste les approches canadiennes et australiennes pour la réglementation des investissements directs étrangers (IDE) dans leurs secteurs minéraux non pétroliers. La raison de cette étude est claire: malgré des environnements démographiques, politiques et socio-économiques analogues, et malgré un régime du secteur minéral/IDE plus restrictif par bien des aspects que le régime canadien, le système australien a été largement accepté par les groupes d'intérêt nationaux et internationaux concernés. Au contraire, la Loi canadienne sur l'examen de l'investissement étranger et l'Agence pour l'examen de l'investissement étranger ont suscité des critiques universelles aussi bien à l'etranger qu'au Canada.

En ce qui concerne les activités minérales, le système australien se caractérise par les éléments suivants. Premièrement, il s'appuie sur une série de règles spécifiques pour chaque secteur, ceci dans le cadre d'un mécanisme général de sélection. Ce qui veut dire qu'après avoir rempli la condition exigeant que le projet proposé 'ne soit pas contraire à l'intérêt national', tout grand projet minier doit normalement satisfaire à l'exigence selon laquelle il doit avoir, soit au moment de l'approbation soit avant le commencement de la production commericale, un minimum de 50 pour cent de participation australienne, ainsi qu'un conseil ou un organisme de contrôle dont au moins 50 pour cent des membres ayant droit de vote sont des résidents australiens. C'est ce qu'on appelle la 'règle des 50/50'.

Deuxièmement, la législation et les lignes directrices actuelles traitent les concessions minérales comme des entreprises commerciales; ce qui fait que toutes les acquisitions de ce genre par des groupes d'intérêt étrangers sont soumises à la revue. En pratique, l'approbation est donnée automatiquement à condition que tout développement ultérieur soit conforme à la règle des 50/50 décrite plus haut.

De plus, le système australien se sert d'un mécanisme de transition innovateur, appelé système de naturalisaion, selon lequel les firmes établies partiellement ou entièrement sous contrôle étranger acceptent de devenir graduellement des propriétés australiennes, et sont par conséquent censées être conformes à la règle des 50/50 du gouvernement en ce qui concerne le développement de nouveaux projets.

Ce système semble avoir fonctionné plutôt bien, surtout si l'on est d'avis que la politique IDE devrait s'occuper du problème de la propriété plutôt decelui du contrôle. D'après les normes mondiales, l'industrie minérale australienne a prospéré pendant la période 1976-82. Il est intéressant de remarquer que tous les nouveaux projets de houille noire approuvés pendant cette période étaient conformes aux lignes directrices des 50/50, soit dès le début soit avant le commencement de la production commerciale. On a constaté que des résultats analogues ont été obtenus pour les nouveaux projets minéraux lancés après juin 1979.

Par contre, le régime canadien a été l'objet de beaucoup de critiques. Bien que des changements de procédure et de personnel aient été effectués depuis la mi-1982, la structure de base reste celle qui a été mise en place en 1974. Ce système exige d'un groupe d'intérêt étranger faisant l'acquisition d'une entreprise minérale ou essayant d'établir une nouvelle entreprise qu'il démontre que ces nouveaux projets rapporteront au Canada des bénéfices économiques considérables. Il est démontré que les critères utilisés sont variables et mal définis; qu'un système de négociation prolongée sert de point central de la méthode de contrôle; et que les accords contractuels qui en résultent, appelés engagements, sont souvent une grande source d'irritation pour les demandeurs.

Ces engagements servent, entre autres, à limiter le développement ultérieur et les conditions de revente des projets particuliers dans lesquels le demandeur a acquis un intérêt bénéficiaire. De cette façon le ministre responsable de la Loi sur l'examen de l'investissement étranger peut atteindre graduellement l'objectif déclaré du gouvernement que tous les grands projets de ressources soient de 50 à 60 pour cent d'appartenance canadienne. Le fait qu'une tactique aussi controversée soit nécessaire résulte de ce que la base législative de la méthode d'examen soit l'entité de l'entreprise particulière. Une fois approuvée, elle peut fonctionner indéfiniment sans jamais avoir à se soumettre à nouveau à la méthode d'examen aussi longtemps qu'elle limite ses opérations à des activités industrielles connexes. Malheureusement, l'objectif du gouvernement en ce qui concerne la propriété des ressources est énouncé en fonction de projets particuliers; c'est pourquoi, pour que l'Agence puisse rendre effective cette ligne directrice implicite, elle doit employer une approche plutôt douteuse consistant à limiter les projets futurs des entreprises au moyen des engagements.

Bien que le système canadien engendre l'incertitude et la frustration auprès des investisseurs étrangers, il est démontré que seul un sous-groupe insignifiant de projets miniers éventuels est effectivement soumis à la revue IDE. Ceci est attribuable au phénomène décrit précédemment selon lequel une firme peut se développer indéfiniment sans être jamais soumise à l'examen, aussi longtemps qu'elle se limite à des activités industrielles connexes. Etant donné le haut niveau de l'investissement étranger au Canada, ceci suggère que bien des entités ayant des bases d'opération au Canada, y compris la plupart des compagnies pétrolières internationales les plus importantes, sont à l'abri des effets restrictifs de la Loi sur l'examen de l'investissement étranger en ce qui concerne les initiatives industrielles connexes. Dans une perspective économique nationaliste, le problème est aggravé par le fait que les acquisitions de concessions minérales ne sont pas traitées comme des entreprises commerciales, et ne sont donc pas soumises à l'examen, à moins qu'elles ne soient considérées comme contenant des réserves prouvées commercialement viables.

En résumé, le régime canadien du secteur minéral/IDE ne couvre qu'une petite proportion de transactions amorcées par des groupes d'intérêt étrangers. Il a néanmoins suscité dans la communauté financière canadienne et étrangère de mauvaise volonté, sans pour autant réussir à satisfaire les aspirations économiques nationalistes. Par contre, le système australien couvre virtuellement toutes les grandes transactions minérales, et a pourtant été largement accepté par la plupart des groupes concernés. C'est pourquoi l'auteur recommande que le gouvernement du Canada envisage sérieusement d'adopter quelques-uns des éléments du système australien pour le secteur minéral non pétrolier du Canada.

1. Introduction

The purpose of this study is to compare and contrast the Canadian and Australian policies towards foreign direct investment in the nonpetroleum mineral sector. The comparative approach has been adopted in order to shed light on the widely held belief that, despite similarities in underlying objectives, the Australian scheme has been, in large part, a political and economic success while its Canadian counterpart has been the subject of rather harsh criticism by both foreign and domestic interests. A scrutiny of the two systems should provide policy makers with an understanding of the reasons for these disparate outcomes; this in turn may lead to modification of the existing Canadian system that could be of assistance to both the mining industry and the community at large.

The current Canadian system of foreign direct investment (FDI) regulation was established in 1974. The main elements of this scheme are the Foreign Investment Review Act (FIR Act)[1] and its bureaucratic arm, the Foreign Investment Review Agency (FIRA). In general, until late 1980, FIRA was widely perceived to be only a minor irritant and obstacle to foreign investors.[2]

Even the U.S. government appeared to condone its existence, as evidenced by the following statement made in 1979 by the then U.S. Ambassador to Canada, Thomas Enders:

> It was feared that FIRA might act as a barrier to new incoming investment in Canada. But it has applied its mandate – to assure benefit to Canada in investment proposals. Its current approval rate of 90 percent is an indication of the quality of proposals it receives. I can understand how Canada relying as heavily as it does on outside investment feels the need for having such a mechanism to insure that its interests are identified and met.[3]

Major tensions started to escalate in February when the then leader of the opposition, Mr. Trudeau, announced during the federal election campaign:

> We want to expand and strengthen FIRA, not weaken it. FIRA's mandate will be broadened to include the periodic review of all foreign firms of large size to assess the performance of these companies in such areas as export promotion and Research and Development. FIRA will also be required to publicize

> proposed foreign takeovers beyond a certain size once they have been submitted to the agency. . . . Most importantly, through government guarantees of bank loans, FIRA will help provide financial assistance to Canadian companies that want to compete for foreign takeovers or repatriate foreign ownership of assets.[4]

In addition, the foreign ownership policies contained in the October 1980 National Energy Program (NEP) further complicated matters. Not only did the concept of Canadianization raise concerns, but FIRA itself was implicated in the strategy:

> The Foreign Investment Review Agency (FIRA) will also continue to play a key role in ensuring the Government's Canadianization goals. Firms that are foreign controlled will continue to be non-eligible firms for FIRA purposes. Moreover, the Foreign Investment Review Agency will vigorously enforce its investment criteria in the mineral sector. The government does not want to see the oil companies use their cash flow to expand into the non-energy part of the economy. Nor does it want foreign-controlled firms to buy already-discovered oil and gas reserves.[5]

The events of 1980 led several governments, in particular that of the USA, to review Canada's FDI policies.[6] What they found was an explicit Canadianization program for the oil and gas industry as embodied in the NEP; a political commitment to strengthen FIRA as enunciated by the Prime Minister in his February 1980 speech and repeated in the 1980 speech from the Throne; and an existing apparatus that, upon scrutiny, was found to be alarming in many ways.

As a consequence of severe investor criticism, the Canadian government announced in November 1981 that it did not intend to impose an NEP-type regime on other areas of the economy.[7],[8] Of equal relevance to this study was the revelation contained in the 1981 study of the Department of Energy, Mines and Resources, *Mineral Policy: A Discussion Paper*, that:

> because of the current high level of Canadian ownership no new measures to strengthen the Foreign Investment Review Agency (FIRA) operations or policies in the mineral sector appear necessary at this time.[9]

Despite these obvious concessions to external pressure, the federal government has resisted, to date, attempts to change in any fundamental way its existing policies with respect to FDI. This refusal has led the U.S. government to take its complaints against FIRA to the General Agreement on Tariffs and Trade (GATT) for adjudication.[10]

In addition to these external pressures, the provincial Premiers have aggressively attacked FIRA as a retarding influence on investment.[11] The Prime Minister responded as follows:

> We would be selling the birthright of our children.... If we abolish FIRA now in the weak state of our industries and businesses they (foreign investors) could just come in and pick it up at a pittance. And it would be the next generation which would be paying for that very highly concentrated domination of our domestic economic environment.[12]

Concerns over the operations of FIRA have also been voiced by many elements of the business community, the Canadian Bar Association,[13] and the leader of the Conservative Party.[14]

On the other hand, some elements of the business press have warned their readers that it is unrealistic to expect any government in Canada to dramatically relax the current restrictions on FDI:

> Businessmen seem to have no sense of the political popularity of economic nationalism, of the fact that no national party in Canada would dare run against FIRA and some kind of national energy program, especially not after Joe Clark's experience with Petro-Canada in 1979-80. Even though business critics won a few skirmishes against the economic nationalists in 1982, causing the Liberals to hunker down a little bit, the government's bastions of economic nationalism, FIRA and the NEP, simply are not going to crumble.[15]

Indeed, one might argue that one of the last areas in which FDI rules would be relaxed is the mineral sector. This is due to the widespread perception that the nation's nonrenewable resources are the property of the community at large. According to this school of thought, nonrenewable resource extraction should be condoned only if it can be demonstrated that significant benefits are being appropriated by the owners of the resource: the people of Canada.[16]

It is probably for this reason that Prime Minister Trudeau in a 1974 speech stated that:

> As our industrial and resource activities grow, we must increase the degree of Canadian ownership. ... However, our natural resources are the underpinning of our whole economy and are therefore of prime importance for Canadian ownership.[17]

The Prime Minister then went on to state:

> The Liberal Party of Canada sets as an objective that new major resource projects in the natural resource field should have at least 50 percent and preferably 60 percent Canadian equity ownership.[18]

Interestingly, this statement was officially adopted by Cabinet in 1978 (CR 40-78RD). Since that time it appears to have been utilized by FIRA as a long-run government policy when evaluating the efficacy of proposals in mineral related activities.[19] In addition, Mrs. Erola, Minister of State for Mines, suggested that, although Canada has no intention of employing a NEP-type strategy to increase Canadian ownership of the mineral sector, the government still expects new mineral projects to be at least 50 percent Canadian owned;[20] hence one must conclude that the Cabinet still intends to pursue the spirit of CR 40-78RD. However, as I shall demonstrate in chapter 3, the policy is not widely known; it has never been publicly debated; and is, in fact, impossible to enforce fully under the current FIR Act.

Indeed, the primary purpose of this monograph is to explore the impact of utilizing the Prime Minister's 1974 pronouncement as the cornerstone of FDI policy with respect to the mineral sector. That is, I shall investigate the merits of requiring all new resource projects to be 50 to 60 percent Canadian-owned. This results in the mineral industry being treated as a key sector within a general screening system, i.e., the Australian Model.

There are number of reasons for undertaking this analysis. First, hearsay evidence suggests that the federal government is already exploring the feasibility of implementing variants of such a scheme. Second, judging from the Australian experience, it is possible that, if all new mineral projects were subject primarily to the 50-percent domestic ownership criterion, many of the charges against the FIR Act and FIRA would be eliminated. That is, a simple decision-making model which places substantial weight on the attainment of 50 percent domestic ownership should reduce the decision time, virtually eliminate the uncertainty faced by proponents, and largely preclude the need to negotiate innumerable performance undertakings.[21]

As will be shown in chapter 3, many of these undertakings, especially those with respect to future activities of mineral-based firms, are necessitated by the broad categories of investments that are currently exempt from review.[22] Under the present rules a foreign firm may expand unchecked, if it is doing so in a related business area. For example, once a firm has received approval to open a coal mining business, it may develop, through grass-roots activity, as many coal ventures as it wishes without ever again being subject to the FIRA process. In response, FIRA has recently tried to preclude such a possibility by requiring applicants to agree to attain a given level of Canadian content, not only in the activities under scrutiny, but in some or all of its future related ventures. As expected, those undertakings have generated extreme hostility within the foreign-owned mineral sector. On the other hand, under the current rules, this is the only way by which FIRA can attempt to meet the government's apparent objective: the 50 to 60 percent Canadian ownership target in all new resource projects.

My objective of exploring the ramifications of fully employing the 50 to 60 percent rule, within the appropriate decision-making framework, will be pursued primarily by assessing the impact of a similar regime on the Australian mineral sector. Although international comparisons are fraught with danger, the difficulties can be minimized by selecting for study countries which are relatively homogeneous with respect to the critical factors impinging upon the mining industry, with the obvious exception of the policy under analysis. It is for these reasons that a Canadian/Australian comparison is particularly relevant.

More specifically, Australia is the only other Western country that employs a general screening mechanism for FDI entering the nation. However, it also employs a key sector approach, with the mineral industry occupying a central position within this framework. As will be thoroughly discussed in chapters 5 and 6, the Australian government's explicit target, since 1 April 1976, has been a minimum of 50 percent domestic ownership in all new resource projects. In addition, the Australians have generally been successful in simultaneously expanding mining activity and enforcing their guidelines. This suggests that foreign interests have largely accepted the Australian FDI regulatory system. This situation exists despite the fact that, in many respects, the Australian rules with respect to foreign ownership levels are more onerous than in Canada, in that *all* new projects are subject to government review and hence to the 50-percent local ownership criterion. As noted above, FIRA's domain is somewhat restricted and, even where it has jurisdiction, it has not applied the Cabinet's 50-percent Canadian ownership rule with any degree of consistency. In summary, it is apparent that the Australian FDI regulatory system with respect to the mineral sector should be of relevance to Canadian policy makers and mining officials.

There are a number of other similarities between Canada and Australia. First, both countries have reasonably similar economic, political, and social structures. For instance, each domain utilizes the Westminster system of government, is populated largely by immigrants from Europe, and is sparsely populated. Both the Canadian and Australian economies are heavily dependent on agricultural and mineral extraction activity; and, in each nation, manufacturing has developed behind a high tariff barrier. Of particular relevance to this study is the fact that both countries have relied heavily on foreign investment for much of their developmental capital. In addition, it will be shown in subsequent chapters that each nation initiated and developed a regulatory system to control certain types of foreign direct investment activity over essentially the same time span: 1972 to 1976.

These similarities in the decision-making environment suggest that policies that have worked particularly well in Australia should be seriously considered for adoption in Canada. Upon detailed investigation, such a transfer may be deemed to be inappropriate but it should not be rejected out of hand. Hence, Australia's experience in employing a special set of foreign ownership rules with respect to mineral sector activities may be of interest to Canadian policy makers. This is especially so if the federal government attempts to pursue implementation of its 50-percent Canadian ownership policy for all new mineral projects. Such a policy, broadly defined, has been in place in Australia for more than six years and during this time the Australian mineral sector has, by world standards, prospered. Therefore, it should be of interest to see what effect these rules have had on exploration, development and business/government relations. In addition, I shall attempt to determine what aspects of the Australian policy could be successfully transferred to the Canadian setting.

In carrying out the assignment, I shall proceed in the following fashion. In chapter 2 I shall present a brief summary of the theoretical advantages and disadvantages of FDI and the agent through which it normally occurs, the multinational enterprise. In addition, theories of economic nationalism will be briefly discussed. The third chapter will be devoted to a description of the historical evolution of the Canadian government's policies towards foreign investment, and a discussion of the present-day FDI regulatory scheme. The following three chapters will present the elements of the Australian system. Its historical development will be presented in chapter 4; this is followed by a discussion of the current system. The sixth chapter, in many ways the most important one in the monograph, subjects the Australian model to a critical analysis. The following chapter is devoted to a comparison of the Canadian and Australian approaches. In the concluding section, policy recommendations are made with respect to alleviating some of the deficiencies of the present-day Canadian system without significantly altering the government's underlying policy thrust. In doing so, reliance is placed on those aspects of the Australian system that are considered to be important to its success, potentially transferable, and relevant to the Canadian scene.

2. The Rationale for Controlling Foreign Direct Investment

Foreign Direct Investment

This chapter presents the major arguments for and against the introduction of foreign direct investment (FDI) control mechanisms. In doing so, both theoretical and pragmatic factors will be addressed as they relate to FDI in the mineral sector. Before moving directly into this analysis, I shall first explore the meaning of the term 'foreign direct investment'.

Although FDI is the focal point of this study, it is only one of three available modes of foreign investment (FI) activity; the other two are portfolio investment (PI) and debt capital (DC). For purposes of this monograph, foreign direct investment is defined as an action by a foreign interest that results in an increase in the amount of equity held where the holdings are acquired for the primary purpose of allowing the foreign interest to exercise a degree of control over the operations of the enterprise. Portfolio investment is equivalent to FDI except that the primary purpose of the transaction is to acquire a financial return on the funds expended without either the desire or ability to influence the policies of the enterprise. That is, PI is passive with respect to control or managerial issues. The final category, debt capital, can be characterized as involving an immediate transfer of purchasing power in return for a fixed repayment obligation. Normally such undertakings do not involve a right to participate in managerial decision making.

It is apparent that the concept of control is crucial to these definitions. However, it is equally obvious that it is a relatively imprecise term. For example, should an acquisition by a foreign interest of, say, 10 percent of the voting stock in a domestic enterprise be classified as a FDI or a PI? Obviously one must look at the distribution of the remaining shares to see if such a holding could result in a transfer of control. Further, a small holding may not in itself allow a firm to exercise control but it may provide a significant base from which an aggressive share purchase plan can readily result in a transfer of control. Alternatively, a share holding may be large enough to facilitate control but the foreign investor may have adopted a passive stance with respect to management decision making.

Even debt capital can influence managerial control or financial autonomy; that is, at a given interest rate, large borrowings can sometimes be arranged only if the borrower agrees to certain restrictions. Such conditions may, for example, severely limit the ability of the firm to pay out dividends or to incur additional loans. Hence, debt capital may result in an element of control by foreign lenders.

According to neoclassical economic theory, foreign investment takes place in response to interest rate differentials between nations. This follows from the assumptions of the neoclassical economics model. According to the theory, all firms have access to the same technology, managerial skills and markets. However, foreign businessmen are, overall, less efficient than domestic entrepreneurs due to lack of knowledge of local traditions, customs, government regulations, and other decision-making problems inherent in absentee ownership.[23] This suggests that FI will normally take the form of debt capital. Indeed, historical data suggest that up until approximately 1920 most FI was of this form. Although FDI increased somewhat over the period 1920 to 1945 in both Australia and Canada, it was not until after World War II that FDI became the dominant form of foreign investment.[24]

For a number of years, economic theory lacked an adequate explanation of FDI by multinational enterprises (MNEs). However, in 1960, Hymer integrated industrial organization and international trade theory to arrive at a new theory of the multinational enterprise[25]; his work has been refined, and related work has been carried out by Caves[26], Vernon[27], and others.[28] According to this model, modern enterprise is characterized by various 'advantages' such as superior technical knowledge, managerial skills, and marketing ability *vis-à-vis* domestic firms. In order to extract all available rent from these 'advantages', firms will, under certain circumstances, set up operations around the globe.[29] Most of the related discussion of this theory refers to the manufacturing sector as, indeed, does much of the policy debate in Canada with respect to FDI; however, the theory can be applied to the mineral sector as well.

Firms are said to undertake FDI in order to internalize two types of transactions. First, processing firms may wish to extend their economic activity back to the source of their raw materials (vertical backward linkages) in order to secure supply. This type of investment is undertaken for defensive reasons: to prevent exploitation by suppliers who have acquired 'an advantage' (a monopoly or oligopolistic position) that they wish to exploit (i.e. by capturing the associated monopoly rents).

A second type of FDI activity is based on the traditional rationale for MNE activity: exploitation of a particular 'advantage' that the investing firm itself possesses. This may be related for example to extraordinary exploration skills or to the possession of a unique technological process that a firm has developed to treat or process a specific type of ore. Hence, it is able to capture a return on its past research and development investment by developing other orebodies with similar characteristics. That is, given these skills, incremental rents may be captured from the deposits by this firm only.[30] In this situation, the rents theoretically belong to the foreign investor, not to the owners of the orebody. Secondly, an MNE may possess marketing skills beyond those possessed by a domestic firm; by investing directly in the mineral phase, it will be able to capture all of the rents associated with its marketing advantage. Otherwise, it may find itself in a bilateral monopoly bargaining position for the required raw materials.[31]

Thirdly, the firm may possess managerial and/or engineering skills that give it a competitive advantage over domestic miners. Although it could theoretically sell these services through a management contract, it reduces the risk of having its 'special advantage' acquired by competitors by undertaking the operation on its own behalf.[32] Lastly, MNES may also possess an advantage over domestic firms by enjoying better access to international capital markets. This may be due to lenders perceiving the MNE as being more efficient *per se* or as being inherently less risky because of the diversified nature of its operations. On the other hand, the MNE may possess an advantage merely due to its superior knowledge of the workings of the capital markets. In any of these situations, the MNE should be able to raise funds at a lower interest rate, or a larger amount of funds at a given rate, than domestic firms.

According to the proponents of FDI, mineral sector investments will aid the host country in several ways. It increases employment and, equally important, real wage rates, since MNES are expected to be more productive due to the advantages discussed above. In fact, diffusion of the knowledge associated with part or all of any 'advantage' should flow to domestic producers over a period of time, which in turn raises the productivity of all the remaining firms in the industry.[33] In addition, tax revenues should increase, allowing the state to provide more goods and services to the community or to reduce taxes below what they would otherwise be.[34]

If my description to this point were complete, one would indeed be surprised to find people objecting to an increase in the level of FDI or even to the existing degree of foreign ownership within the mineral sector. Let us now explore some of the counter arguments.

The Truncated Firm Model

The 'Truncated Firm' thesis is based on the host country's perspective of the negative aspects which arise out of FDI generated by the 'advantage' model of the MNE.[35] The behavioral assumption of global profit maximization suggests that such firms may engage in a number of activities which lead to a lower level of benefits to the host country than if these firms were operated and controlled by domestic entities.

For example, it is stated by the advocates of the truncation argument that such firms will undertake less research and development than similarly situated domestic firms. If this occurs it could indeed generate serious long-term effects on the technological progress of the domestic economy. Equally disturbing to the critics is the purported failure of many branch plants to obtain export mandates. That is, these operations may be designed to service the local market only. Given the relatively small size of the Australian and Canadian markets, it follows that most of these plants will be high cost operations due to limited production runs. From a global perspective, it makes sense to fill orders from the least-cost production centre which, as suggested, is unlikely to be located in either of the nations considered in this study.

A related argument exists with respect to imports: it is suggested that branch plants have a significantly higher propensity to import than similarly situated domestic firms.[36] This may be due to these entities being required to purchase supplies from other parts of the MNE or from other home country suppliers. In either situation, economies of scale can be exploited. Although this behaviour is rational from the MNE's perspective, it is frequently deemed to lead to unfair treatment of host country suppliers and labour.

Other arguments are sometimes advanced with respect to the truncated firm thesis. First, many observers are concerned about the range and quality of employment opportunities available within the host country. It has been suggested that, within many branch plant operations, the key management decisions are made in the home nation; hence, the related jobs are there too. Although the merits of the argument are dubious from an economic efficiency perspective, many citizens, especially parents desiring a 'better life' for their children and a chance for them to remain within the local community, appear to attach utility to this phenomenon. Second, and related to the above, is the issue of the locus of decision making.[37] If MNEs, for efficiency reasons, centralize their decision-making process, then the host nation not only suffers a loss of jobs and faces potentially injurious decisions due to a lack of sensitivity to local cultural, political, and economic aspirations, but also forgoes potential benefits from the long-term diffusion of knowledge related to managerial and technological skills.

The proponents of the truncated firm thesis do not suggest that FDI is inherently 'bad' and should therefore be terminated. Instead, they believe that the level of benefits are less than they might otherwise be if alternative institutional arrangements were employed. In fact, they suggest that this could be done in a 'costless' fashion. For instance, if performance undertakings were imposed on foreign operators, they could be forced to undertake additional research and development activity and obtain export mandates from their parents. According to the advocates of such a policy, this outcome could be obtained without affecting any other aspect of firm behaviour – hence the label: 'a costless policy' solution. This statement is based on the premise that some of the monopoly rents earned by the MNE, due to a particular 'advantage', could be captured by the government without introducing incentives for these firms to alter their managerial decisions.

If the problems suggested by the truncated firm thesis are found to exist in practice, then corrective action should be contemplated. Unfortunately, it has proven to be extremely difficult to find an operational analogue of the 'costless' control device.

In summary, it should be stated that the truncated firm model was devised primarily to apply to the manufacturing sector; it appears to have much less relevance in describing the potential host country problems with respect to FDI in the mineral sector. This is based on the following observations. Mining ventures do not operate behind a tariff wall, and hence their scale of operation tends to be of an efficient size. In addition, a high proportion of the material is exported (albeit in raw form); imports in the operating phase are a much lower percentage of sales value than in manufacturing; and Canadians and Australians possess 'world class' mining skills and knowledge. Hence, with the possible exception of the 'further processing' issue, there is not the same need to attempt to negotiate a better deal for the host country through firm-specific agreements.

Distributional Issues and Economic Rent

Perhaps the strongest argument in favour of exercising some degree of control over foreign direct investment in the mineral sector is based on the concept of economic rent and the resulting debate over its distribution to the various claimants.[38] Economic rents are herein defined as 'a gift of nature whose exploitation yields a return beyond the necessary factor payments to the labour and capital required for its discovery and extraction'.[39] The definition allows for a normal risk-adjusted return on capital and managerial skills.

This concept is of particular relevance to the Canadian and Australian policy debate because of the widespread belief that a country's nonrenewable natural resource base is part of the national heritage.[40] According to this line of thought, the resources exist for the benefit of all citizens and hence it is the government's job to ensure that, if they are developed, the nation as a whole should capture a 'fair' share of any resulting economic rents.[41,42] In fact, in Australia and to a lesser extent in Canada, the argument goes beyond one based on morality and ideological belief, since the Crown itself owns the subsurface or mineral rights of most developed and prospective orebodies. This suggests that the government, as owner of the property rights, should appropriate the rent attributable to the mineral deposit.[43]

These arguments lead to calls for resource rent taxation over and beyond the corporate income tax and traditional *ad valorem* royalty structures presently encountered by the mining industry in many parts of both Canada and Australia.[44] According to economic theory, it is possible to design a tax to capture economic rents without creating adverse repercussions on the economy. In practice, it is extremely difficult to define rents with any degree of precision, and thus it is virtually impossible for the state to extract a large proportion of the surplus without running the risk of introducing severe disincentive effects on long-term investment activity. This view is promulgated by Wilkinson:

> It is no easy task to determine the economic rents for any one mine or oil pool, let alone to construct a standardized tax structure to appropriate all, or a majority of the rents, on the one hand, and to avoid, on the other hand, dipping into the return required for the investment to take place at all and for new domestic exploration to continue as desired.[45]

Reinforcing this concern is the widely held view that, for reasons of managerial efficiency, marginal tax rates must be kept well below the levels required for the government to capture most of the available rents. In addition, the political reality of the situation is such that resource rent taxes are difficult to introduce, due in part to the nature of federal/provincial relations and constitutional considerations.[46] In summary, resource rent taxes are difficult to design due to the technical, measurement, philosophical and political problems.

Therefore, governments are forced to search for other vehicles in addition to or exclusive of the taxation of economic rent in order to ensure that their citizens receive a 'fair' share of the economic rent from resource extraction.[47] They are encouraged to do so because under the present system, in the presence of a significant level of foreign ownership, nonresidents may appropriate a large part of the available surplus.[48] This problem can be addressed in part by increasing the degree of domestic ownership of nonrenewable resource properties.

Then, even if the state undertaxes relative to its socially sanctioned share, at least a larger share of the rents will flow to domestic residents rather than to foreigners.

Transfer Pricing Activity

The concept of transfer pricing can be defined as manipulation of either input or output prices in such a fashion as to reduce reported profits and hence host country tax payments.[49] The problem is potentially serious within the mineral sector for three reasons. First, the theory of internalization and the MNE suggests that firms will attempt to maximize profits on a global, not a national, basis. One method of increasing profits is to reduce tax payments. This can be done by taking profits to low tax centres and away from high tax domains.[50] There are several vehicles available for doing so: management fees; intercompany royalty payments for access to parent developed technology and computer systems; marketing fees; artificially high prices paid for services provided by the parents; and artificially low prices paid for host country products.

In addition, the so-called 'thin capitalization' issue, as identified by Harris,[51] may prove to be troublesome for taxation officials. This technique involves the use of inordinately high debt/equity ratios, with the debt instrument being in the form of loans from the parent firm. Since interest payments are tax deductible for corporate income tax purposes, whereas dividends are not, it is possible for a firm to effectively shift profits to a lower cost tax centre. Smith,[52] in his brief assessment of the concept, points out that, except where debt is provided at artifically high rates of interest, the 'thin capitalization' phenomenon may reduce taxable profits but not economic rent. Nevertheless, the concept is potentially serious but little studied.

The second reason for considering the issue of transfer pricing is that some mineral products such as bauxite, iron ore, and perhaps coal, are nonhomogeneous in nature. Hence, it is difficult to find an arm's-length reference point for evaluation of these products. Third, the combination of a high level of FDI and intercompany trading provides a significant opportunity for transfer pricing activity:

> About 58 percent of metal mining assets and 68 percent of petroleum and natural gas extraction are foreign controlled. At least 60 percent of foreign subsidiaries' exports are to parents or affiliates, and these firms also purchase about 75-80 percent of their total imports from parents or affiliates.[53]

The existence of transfer pricing is extremely difficult to establish. In Canada, the evidence is mixed. Pye,[54] in his brief assessment of the Canadian iron ore industry, finds no support for the long-standing allegation that the U.S.-owned firms in this industry have engaged in transfer pricing activity. Similarly, Rugman finds no evidence of such activities within MNES operating in the Canadian mineral sector.[55]

On the other hand, Wilkinson is less sanguine on the issue; his reasons are displayed in table 1 and in the following quote:

> It is also possible for foreign-owned firms to minimize profits, and hence taxes, in Canada by their control of the prices at which products are shipped between subsidiaries and parents, and vice versa, and by a range of other charges for management fees, technology, and so forth. The data for the metal mining industry for 1972-76 are certainly consistent with this possibility. In each of the five years three different measures of profit rates indicate that foreign-owned firms consistently had substantially lower profits than did the Canadian-owned sector of the industry. The foreign rates of return averaged only 36 percent of those reported by Canadian owned firms.[56]

Wilkinson's comments are important for a number of reasons. First, the period 1972-76 was clearly a time of 'boom' conditions for the Canadian metal mining industry and hence a period during which one would have expected significant economic rents to have been generated. On the other hand, one might argue that all that the data show is that foreign firms are less efficient than domestic firms.[57] This result is contrary to what is suggested by the theory of the MNE and in fact, if true, would indicate that FDI should be discouraged because it is less efficient than Canadian operations and hence leads to a loss of rents. Alternatively, if the results reflect transfer pricing activity, it follows that both the federal and provincial governments may be foregoing tax revenue by relying on this mode of development. In conclusion, a definitive case for the presence of transfer pricing has not been established but, nevertheless, the circumstantial evidence is somewhat disturbing.

Economic Nationalism and the Mineral Sector

One of the major objections to foreign-controlled corporations has been the complaint that their locus of decision making resides elsewhere (an assumption), and that the resulting decisions do not necessarily reflect the best interests of the host country.[58] This may be attributable to ignorance of local culture, economic and political aspirations, and other environmental factors. Alternatively, it may be based on conscious decisions to engage in transfer pricing in order to minimize tax payments to the host country, or to undertake other actions which, although legal, may result in less economic activity in the host country than would occur if these entities were domestically controlled. The latter two items have been discussed previously in the subsections on transfer

TABLE 1

Profit Rates, Foreign-Owned and Domestic Metal-Mining Firms, 1972-76 (Percentage)

	1972		1973		1974		1975		1976	
	Foreign-Owned	Domestic	Foreign-Owned	Domestic	Foreign-Owned	Domestic	Foreign-Owned	Domestic	Foreign-Owned	Domestic
Net profit before tax as percentage of total equity	.01	.12	.17	.28	.13	.34	.06	.18	.06	.15
Net profit after tax as percentage of total equity	.00	.09	.13	.18	.07	.19	.03	.12	.05	.10
Net profit before tax as percentage of capital employed	.00	.08	.11	.19	.09	.24	.04	.13	.04	.09
Average	.003	.096	.137	.217	.097	.257	.043	.143	.05	.113
Foreign firms' return on equity as percentage of domestic firms' return on equity	.03		.63		.377		.30		.44	

Source: B. W. Wilkinson, *Canada in the Changing World Economy* (Montreal: C. D. Howe Research Institute, 1980), p. 146.

pricing and the truncated firm, and hence will not be included in my use of the term 'economic nationalism'.

One element not discussed to this point is the broader issue of extraterritoriality: the extent to which foreign laws infringe, in a negative fashion, on the host nation.[59] In the eyes of the economic nationalist, the foreign-controlled corporation is viewed as the primary vehicle whereby this phenomenon is transmitted to the host country. Although the extent of the 'problem' is not known, the possibility for its occurrence clearly exists.[60] Perhaps the best mineral-related example of such an extraterritorial application of U.S. law to Canada in recent years was the Westinghouse/Uranium Cartel confrontation.[61] In this situation, U.S. courts tried to force Canadian-based uranium producers to present evidence before them. The Government of Canada passed legislation to prevent such actions. Although corporations that were not U.S.-owned were able to comply with Canadian law, Gulf Minerals, which is a subsidiary of the U.S.-owned Gulf Oil Co., was placed in an untenable position. Eventually Gulf did supply information on its Canadian subsidiary's actions in the cartel, but only enough to anger Canadian officials and not enough to please U.S. interests. Indeed, the uranium cartel is an excellent example of the difficulties faced by a foreign firm in reconciling the interests of the host and home governments. Notwithstanding the ethical and legal issue involved, it remains a distinct possibility that, sometime in the future, the government may deem it to be in Canada's interests to join a producer's cartel covertly once again. However, the greater the degree of foreign ownership, the greater the difficulty of using moral suasion to cajole producers to accept such a policy.

In all of these situations the presumption exists that, if these corporations were domestically controlled, either the problems would not exist or, if they did, domestic firms would prove to be more susceptible to ameliorative action. This is, of course, a debatable conclusion, but nevertheless foreign-controlled firms do from time to time face divergent demands from host and home governments. For purposes of this study, the issue of management control with respect to extraterritorial application of foreign law will be identified as 'economic sovereignty'.

In discussing economic nationalism, attention should be directed to the seldom-discussed issue of the distribution of foreign investment by country of origin.[62] The same logic that leads most nations to define corporate control in terms of both individual and total foreign holdings also applies with respect to the economic sovereignty issue. This suggests that the ideal FDI regulatory regime should not only restrict foreign direct investment *per se* but that it should also take into account the nationality of the investment. However, to do so would attract charges of discrimination from the injured parties; in the context of the Canadian case, the USA would have to bear the brunt of any policy designed to ensure that FDI is widely diffused with respect to nationality of the investor. Although the argument has technical merit, it is not a politically feasible option at this time.

In the context of the ownership-versus-control debate, it is apparent that those economic nationalists who are concerned primarily about economic rents will not be concerned, to any extent, with the nationality of the foreign investor. However, those economic nationalists preoccupied with the economic sovereignty issue must direct their attention to the issue of control and hence the distribution of FDI by country of origin.

The term economic nationalism is also associated with another position: the belief that the mere presence of foreign investment in a nonrenewable resource property generates disutility. For purposes of this study, I shall identify this phenomenon as 'economic patriotism'. This concept is sometimes revealed through such vehicles as a public outcry over the extent of dividend repatriations, or over an announcement of accounting profits by a foreign-owned firm even though the level of profit represents a normal or even sub-normal rate of return on investment.

Although potentially rooted in such base instincts as jealousy, economic patriotism is still a legitimate expression of public opinion that may be ignored by governments only at their peril. Support for this concept is apparently persistent and widespread in both Canada and Australia. This is evidenced by the results of public opinion polls on the desirability of FDI controls and, more specifically in the Canadian context, by the broad-based public support for the Canadianization objective of the National Energy Program.[63]

In summary, the economic nationalist philosophy has been separated into two components: economic patriotism and economic sovereignty. The former concept relates to the issue of foreign ownership *per se* while the latter focuses on the notion of control and the locus of decision making.

Rationale for Economic Nationalist Sentiments

An underlying question that has not been previously addressed in this study is why do many voters support restrictive FDI policies, while also accepting the prevailing argument that FDI directly increases employment, real wage rates, and tax revenues? The apparent contradiction has two dimensions. First, the above analysis has been restricted to material factors. As became widely known during the pollution/environmental debates of the 1960s and early 1970s, the traditional analysis ignores many attributes that impinge on the *total* well-being or economic welfare of the nation. For example, some voters place weight on such factors as self-determination, national identity, and preservation of a culture. Others believe that a full range of job options should be available for their children and, if the theory of the truncated firm applies, such choices many be restricted.[64] That is, the quality of employment opportunities must be considered, not just the earning potential of available jobs. Further, equity considerations abound: it is perceived by some to be unjust (a violation of the fundamental principle of the nation state) that foreign interests should capture a large share of the benefits from the exploitation of the host country's nonrenewable resource base (a question of the distribution of economic rents). Indirectely, these variables related back to basic human values such as pride, prestige, power, freedom and justice (equity).

The problem facing policy makers is that these preferences cannot be expressed through a market mechanism. The output is intangible and hence virtually defies measurement.[65] In addition, economic nationalism is primarily a public-consumption good. That is, consumption of this output (policy) by one individual does not detract from the amount available for all others.[66] Economic theory states that, even if these desires could be somehow quantified in a fashion that facilitates meaningful aggregation, the presence of utility maximization behaviour precludes the 'true' disclosure of preferences.[67] This phenomenon, known as the 'free-rider' problem, occurs because individuals can reduce their tax payments by understating the actual benefit received. They do so because they believe that others will continue to relate their true preferences to the authorities. The result, in this case, will be the production by the government of a sufficiently large quantity of the good which allows the 'free-riders' to receive the benefits at no direct cost to themselves. Unfortunately, most individuals will eventually attempt the same strategy; in time the user-pay system collapses but the underlying preferences for economic nationalist policies still remain. Hence, both the measurement and preference disclosure problems necessitate government production.

The problem, which is inherently political, is that the means available for measuring such feelings are incredibly inadequate. For instance, governments must rely on public hearings, lobbying efforts by vested interest groups, public opinion polls, and letters to newspapers and to politicians in order to gain a sense of community preferences.[68] To this point we have discussed the intangible aspects of the economic nationalist debate. Although some people obviously find these policies to be abhorrent *per se*, casual empiricism suggests that, everything else being equal, most people desire to be in control of their own destiny.

A second important dimension of the economic nationalist model is the distribution of the tangible benefits generated by restrictive FDI policies. As previously stated, such policies are generally perceived to entail a net economic cost to society in terms of the benefits foregone from a lower level of economic growth. However, not everyone loses in a material sense from policies limiting FDI. It is probable that, from a materialistic perspective, the distributional consequences of restrictive FDI policies are such that workers and businessmen in the sheltered firms may gain while the broader community loses.[69]

The above observations are important when assessing the politics of FDI regulation. In general, most people gain some psychic pleasure from nationalistic initiatives but they also lose materially by doing so; the amounts involved are not usually perceived to be large. If the public opinion polls are accurate, the utility gained from the incremental psychic income must, for most people, outweigh the loss of utility associated with diminished economic growth. However, some people bear a disproportionate share of the benefits or costs: it is these individuals and their representatives who are the vocal actors in the FDI debate.[70]

This type of analysis leads one to expect more affluent provinces, especially those characterized by relatively low rates of unemployment, to support controls on FDI. Hence, Ontario residents not surprisingly tend to support restrictions: this outcome is undoubtedly accentuated by the presence of a high level of FDI throughout its industrial structure. The basic premise also suggests a similar response in western Canada. However, although they have been historically mildly supportive of such policies, the otherwise-expanding areas bear the brunt of restrictive FDI policies. Hence, much of the actual costs of FDI controls are presently absorbed by western Canadians.[71] In addition, many westerners are unable to see any appreciable difference between 'eastern' and foreign domination.[72] A similar situation has been noted in Australia.[73] In Quebec and the Maritime provinces the desire for jobs to relieve chronic unemployment and to provide a higher wage structure tends to swamp the impact of more intangible factors. In summary, economic nationalism can be viewed as an income-elastic good: in prosperous times and in prosperous regions one will find a stronger degree of support for restrictive policies. Hence, given the current economic climate, it is natural that such policies will be increasingly under attack. This is not attributable to a change in attitudes *per se*; instead, it is due to the fact that the opportunity cost of providing the same amount of output (economic nationalism) has risen sharply.

A major problem encountered by the policy maker is that investment decisions have a long-term impact, whereas the current economic problems are transitory, we hope. Thus, a radical move to eliminate all restrictions on FDI might have some psychological and perhaps even some economic impact in the short term. However, once more prosperous times return, the theory suggests that economic nationalistic sentiments will take on greater weight (the opportunity cost of such outputs will decline and thus a greater quantity will be demanded). This implies that an undue emphasis on short-term economic problems could lay the foundation for an NEP-type policy in nonpetroleum sectors of the economy, once more buoyant economic conditions return.

Methods of Controlling Foreign Direct Investment

Let us assume that the central government has decided, in its role as interpreter of broad social preferences, that the aggregate demands of economic nationalists are sufficient to outweigh, up to a certain point, the weighted loss in utility suffered by the members of the community who must bear the burden of such policies. The government must then select the appropriate mechanism through which it is to carry out its policies.

Probably the best discussion of such options is contained within the *Gray Report*[74] published by the Government of Canada in 1972. The document outlined three devices:

i a general screening system;
ii a fixed-rule system;
iii a key-sector approach.

Before discussing each scheme it should be stated that Gray presented the options as if they were mutually exclusive[75] but, as will be subsequently shown, this need not be the case.

THE SCREENING PROCESS

A general screening system is based on the premise that the government can increase the net benefits to the nation through a bargaining process.[76] The rationale for the scheme rests on the internalization argument of the MNE; therefore, it is the role of the screening agency to work on a case-by-case basis to attempt to extract a higher proportion of the monopoly rent generated by MNEs for the citizens of the nation state. In doing so, the government is essentially taxing these firms since they are required, as a condition of approval, to undertake activities that they would not otherwise have performed. For example, a new mineral producer may be required to undertake further processing in Canada prior to export since this activity leads to incremental value added and a positive impact on the balance of payments. Alternatively, investors may be required to purchase a greater proportion of inputs from domestic firms; this also acts as a tax, with the benefits received by the domestic suppliers and their employees. Another approach is to require foreign firms to take in domestic partners: compulsory joint ventures. This policy is expected to result in a sharing of rents with the local firm and to increase the probability that valuable skills will be acquired by the indigenous entrepreneur. Unfortunately, the theory of the MNE suggests that compulsory joint-venture arrangements provide the greatest incentive for transfer pricing, since the foreign firm may attempt to appropriate the full benefit from its rent-producing factor.[77] On the other hand, a government can normally count on domestic partners to protect their own interests and hence the government's by trying to prevent profit-stripping tactics.[78]

The general screening approach is not without problems. It tends to be very time consuming, since the peculiarities of each case must be understood and then followed up by a potentially protracted negotiating session. Since the rules must be necessarily imprecise, the process generates uncertainty for the prospective applicant; concomitant with this, it breeds suspicion about the fairness of the system since applicants may readily believe that their competitors received a less exhaustive scrutiny and were presented with fewer demands by the government.[79]

FIXED-RULE SYSTEM

In its most simplistic version, this approach requires that a set of criteria be specified that must be met by all prospective investors. For example, the government may insist on a minimum level of domestic equity ownership, and a minimum proportion of the voting members of the board of directors being citizens of the host country.

This approach has the very virtues that the screening system lacks, but performs poorly in those areas where the prior scheme thrives. It presents the investor with a large degree of certainty; it is readily apparent if someone has received 'favourable' or 'unfavourable' treatment; in addition, time for decision making should be minimal. On the other hand, the scheme fails to address differences between sectors: for example, the mineral sector is more likely to give rise to economic rent than others; the banking, near bank and insurance industries may be important for macroeconomic management reasons; the media are of critical importance for cultural reasons; and the oil and gas sector of concern for reasons of security of supply as well as the previously stated economic rent rationale. In addition, the manufacturing industry is of significance for its employment and research and development potential. This suggests, for example, that the policy maker may wish to encourage FDI in the manufacturing industry in times of low employment but continue to restrict FDI in other types of industries, for example newspapers. Unfortunately, it is apparent that a fixed-rule system largely precludes such a rational, sensitive approach to planning.

KEY-SECTOR APPROACH

Under this approach, certain sectors of the economy are designated as being of unusual importance. In the polar case, the solution is to preclude FDI in these sectors but to allow it everywhere else. It is apparent that this scheme reduces the visibility of the control system and essentially precludes the need for an administrative structure: FDI is either totally unconstrained or it is totally excluded. The investor faces a relatively certain world in the sense that there is no waiting period for a decision; in addition, there are no bureaucratic constraints, beyond those faced by domestic firms, in any sphere in which the foreign firm is allowed to operate.

Unfortunately, in its simplistic version, as discussed above, the scheme is too rigid: a 'zero:one' or 'yes:no' model ignores the fact that most public policy issues appear in the form of a continuum. Although a given industry may be designated a key sector, the government may still desire a limited degree of foreign participation within a subsector of the industry. For example, a country may possess adequate domestic skills with respect to conventional oil drilling but lack offshore drilling technology. The simple key-sector model fails to recognize these intrasectorial differentials.

In summary, it is generally accepted by most societies that, notwithstanding the many positive attributes of FDI, there are some types of behaviour that the nation wishes to discourage. The simple key-sector approach is, in most instances, too blunt an instrument to facilitate such a policy objective. However, it does, albeit in the extreme, recognize that some areas of the economy are of greater significance to issues of economic nationalism than others.

Summary

In this chapter the major arguments for and against FDI have been outlined. Although the nature of this study requires a focus on the 'problem' associated with foreign direct investment, it must be stressed that such activity does exhibit many positive attributes. It directly contributes to the level of economic activity in the host country: among the visible elements of this phenomenon with respect to the mineral sector are increased employment, wage rates, tax receipts and exports. In addition, important contributions may occur indirectly through the diffusion of managerial skills and technological knowledge. Nevertheless, FDI is perceived by many citizens to carry with it one or more negative attributes, presented in this chapter under the following headings:

i truncated firm thesis;
ii economic rent;
iii transfer pricing;
iv economic nationalism
  – economic sovereignty
  – economic patriotism.

In the analysis, it was implied that the truncated firm and economic sovereignty issues tend to be associated with the concept of managerial control and the locus of decision making. On the other hand, the economic rent, transfer pricing, and economic patriotism issues are more closely identified with the notion of foreign ownership than control. Those categorizations are arbitrary; nevertheless, they appear to capture the prevailing relationships contained with the relevant policy debate in Australia and Canada.

Further, the analysis contained herein suggests that the appropriate choice of one or more regulatory instruments such as a general screening device, a fixed-rule policy, or a key-sector regime must be based upon the government's perception of those attributes of FDI which generate significant social costs. Given the diverse nature of most industrialized economies, it is probable that most sectors will exhibit differential social costs as well as social benefits per dollar of investment. For example, the truncated firm argument has greatest applicability to the manufacturing sector; the media and financial industries tend to be viewed as important instruments of cultural and economic sovereignty; and the mineral sector generates special interest with respect to the concepts of economic rents and economic partiotism. This suggests that the regulation of FDI, if it is to take place, should be on a sector-specific basis with different policies applying to each sector subject to regulation. Such an approach should minimize the efficiency loss (reduction in social benefits) associated with any given reduction in social costs generated by FDI controls.

In closing, it must be reiterated that any control mechanism may itself affect the quantity and form of FDI and hence reduce the level of gross benefit to the host country. Indeed, much of the policy debate over the Foreign Investment Review Agency hinges on this point. That is, it is frequently suggested that, in our attempts to reduce the cost of FDI, we lose sight of the damage that is inflicted on the overall economy and on various groups within the community.

Let us now examine the historical development of the present-day FDI regulatory scheme in Canada. In addition, this regime will be subjected to a brief operational review and the major criticisms will be noted.

3. Development and Operation of the Foreign Investment Review Agency

Introduction

The purpose of this chapter is to outline the historical development and operating experience of the Foreign Investment Review Agency (FIRA) as it relates, in particular, to foreign direct investment (FDI) in the mineral sector. Perhaps the most striking feature of the historical evolution of FDI policy in Canada is the relatively recent nature of the public debate. Prior to 1920, foreign investment in Canada normally arrived in the form of debt capital (DC).[80] From 1920 until the late 1940s, FDI increased steadily, but foreign ownership levels were still not large enough to give rise to political consternation. However, by the late 1960s the situation had changed significantly; supporting evidence is provided in tables 2 and 3. In particular, observe that the proportion of foreign ownership in the mineral and manufacturing sectors increased from 38 and 35 percent to 65 and 57 percent respectively, between 1926 and 1967.

TABLE 2

Nonresident Control of Canadian Industry, 1926-67
(Percentage of total book value of capital employed controlled by nonresidents)

Industry	1926	1930	1939	1948	1954	1963	1967
Manufacturing	35	36	38	43	51	60	57
Mining and smelting					51	59	65
Petroleum and natural gas	38	47	42	40	69	74	74
Railways	3	3	3	3	2	2	2
Other utilities	20	29	26	24	8	4	5
Total (including merchandising and construction)	17	20	21	25	28	34	35

Source: William L. Marr and Donald G. Patterson, *Canada: An Economic History* (Toronto: Gage, 1980), p. 297.

TABLE 3

Percentage Distribution of Foreign Capital Invested in Canada, by Source and Type, 1900-67

Year	Great Britain	United States	Portfolio	Direct Investment
1900	85	14	75	25
1905	79	19	—	—
1910	77	19	—	—
1916	66	30	—	—
1920	53	44	—	—
1926	44	53	70	30
1930	36	61	68	32
1933	36	61	68	32
1939	26	60	67	33
1945	25	70	62	38
1950	20	76	54	46
1955	18	76	43	57
1960	15	75	42	58
1967	10	81	40	60

Source: William L. Marr and Donald G. Patterson, *Canada: An Economic History* (Toronto: Gage, 1980), p. 268.

With few exceptions, FDI first became a topical issue after the Royal Commission on Canada's Economic Prospects[81] submitted its final report (henceforth called the Gordon Report). The report noted that the level of foreign ownership was unacceptably high in oil and gas, mining and manufacturing.[82] Equally disturbing to the Commissioners was the finding that a large proportion of the voting shares in these sectors was owned by U.S.-based investors; this raised concern about national sovereignty and economic independence. Overall, the report as supportive of the role of FDI in all sectors; however, it did contain a qualification with respect to mining activities:

> The granting of applications for mining rights, oil leases and timber limits is the responsibility of the provinces under the Canadian constitution. With this in mind, the Commission suggests that provincial governments might well consider requiring foreign applicants for such rights in future to incorporate under Canadian laws and to take in Canadian partners. We suggest that the Federal Government take similar action with respect to the Northwest Territories and the Yukon.[83]

Over the following decade many *ad hoc* policies were initiated to restrict, in one way or another, the level of FDI within specific areas of the economy.[84] In 1957 and 1958 policies were implemented to ensure that Canadian citizens would effectively control life insurance companies and radio and television stations. From 1960 to 1964 a series of tax changes was introduced to encourage Canadians to buy stock in Canadian-based companies; these initiatives were largely attributable to Walter Gordon's efforts to encourage a 'buy-back' of the Canadian economy. In 1964 and 1965 amendments were made to several pieces of legislation to ensure that Canadians were in a position to control the nation's financial sector: specifically, federally incorporated insurance, trust and loan companies and chartered banks.

The communications industry was also the subject of a major policy change in 1965. Once again, the tax system was utilized to virtually preclude the possibility of foreign control over the 'print' media; this was achieved by declaring advertising outlays in magazines and newspapers owned by non-Canadians to be nondeductible for income tax purposes. Finally, in 1966, in response to U.S. government pressure on its foreign subsidiaries to engage in activities to aid the U.S. balance of payments situation, the Canadian government issued a set of guidelines outlining the government's expectations with respect to acceptable behaviour of multinational enterprises (called the Winters Guidelines).[85]

The first comprehensive publicly-commissioned study of the effects of FDI was instigated, once again, by Walter Gordon in his role as President of the Privy Council. His office organized a group of Canadian academic economists, headed by Mel Watkins, to explore the ownership and structure of Canadian industry. This study,[86] hereafter called the Watkins Report, stressed the issue of political independence:

> Foreign direct investment is not an economic phenomenon alone. It is also a political phenomenon. Foreign control means the potential shift outside the country of the locus of some types of decision making. . . . To the extent decision making is eroded, national independence . . . is reduced.[87]

The report went on to state:

> The serious cost for Canada resulting from foreign ownership is the intrusion of American law and policy into Canada. For Canada, the essential feature of the problem is not the economic cost, but the loss of control over an important segment of Canadian economic life.[88]

With respect to the mineral sector, the report said little. Watkins was, of course, concerned about the control and ownership levels within this sector but the report failed to provide a discussion of the merits of FDI in the mineral industry versus other areas of the economy. The Task Force's major recommendation was that a special agency should be set up to act as a surveillance unit;[89] this idea was subsequently picked up and expanded upon in the Gray Report.

In response to the Watkins Report, the Standing Committee on External Affairs and National Defence of the House of Commons[90] addressed the role of FDI in the Canadian economy. In contrast to the Watkins Report, the Wahn Report (as the Committee's report came to be known) drew attention to the importance of the resource sector and the need for FDI controls; its rationale for doing so was primarily based on the issue of further processing. The tenor of the committee's report can be found in the following quote:

> The committee believes that the large number of American based multinational corporations operating in Canada pose special considerations as compared to domestically owned firms – in the leverage they possess in negotiating concessions from governments, in their ability to avoid host government planning and policy measures, in the possibilities open to them for price fixing, in the formation of cartels, in market allocations, in tax shifting, in the extraterritorial intrusions of foreign laws which may accompany their activities and in their general disinclination to permit Canadians to own the majority of voting shares in their Canadian companies. Accordingly, it is imperative that multinational corporations be supervised particularly carefully by the commission.[91]

The committee's conclusions are of particular interest: they recommended that a 'Canadian Ownership Law' be enacted which would establish a Canadian ownership and control bureau under the direction of a minister. The functions of the bureau would be quite similar to the functions given by the Watkins Report to its proposed surveillance unit: the provision of advice and the generation of research studies.

It is important to note that the Wahn Report suggested that:

> as a general rule it is desirable that Canadians should control Canadian companies by owning at least 51% of their voting shares, particularly in the important sectors of the economy where American control is now most highly concentrated, and that we should move toward this goal as rapidly as capital requirements and other relevant circumstances permit.[92]

The mining industry was obviously included in the target group, since the committee had previously expressed concern about the high level of foreign, particularly American, ownership in the resource sector.[93]

Although the Wahn Report did not directly influence government policy, it is said that the federal government, knowing in advance the nature of the committee's recommendations, initiated a preemptive strike by setting up a Cabinet-level review of FDI; this task was given to Herb Gray, then a Minister Without Portfolio in the Trudeau cabinet. His report,[94] which was eventually released in 1972, continues to have a significant impact on the FDI debate in Canada. As in the case of the Watkins and Wahn Reports, Gray was concerned with the level of FDI as well as its distribution by sector and by country of origin. In particular, the manufacturing, mining, and petroleum industries were listed as areas of concern.[95]

In contrast to previous studies, Gray recognized the distinctiveness of the mineral sector with respect to the motivation and rationale for investment, and the differential impact of its benefits and costs. Nevertheless, an analysis of the manufacturing sector dominated the report; within this sphere, he was preoccupied with the truncated firm thesis.[96] According to this theory, foreign firms responded to the imposition of a tariff wall by setting up branch plants within Canada; these operations are truncated in that they are generally characterized by: small scale operations, limited research and development activity, decision-making authority located in the home country, a high propensity to import inputs from the parent, and a failure to obtain an export mandate from the parent. It is this view of the world that dominates the report.

According to the Gray Report, foreign firms invested in Canadian resources primarily for backward vertical linkage reasons: 'the extension by a firm into earlier stages of the productive process'.[97] The underlying motivation is said to be based on the need to secure supplies and to exploit the superior export-oriented marketing position enjoyed by these processing or manufacturing-based firms.[98] The report clearly acknowledges the advantages of FDI in the mineral sector for the reasons mentioned in chapter 2: primarily employment, output (income), and tax revenues. It is suggested that Canadians, at least historically, would not have been able to carry out these activities on their own, primarily due to a financial and market gap. That is:

> Resource development frequently required enormous pools of capital which were not in all cases available from Canadian sources. This reflected, in part, deficiencies in Canadian financial institutions, and, in part, the fact that the Canadian economy was unable to aggregate the sums required for all resource developments. Large markets were often essential to achieve maximum economies of scale in development and production, and exploration, at least in certain sectors. Both these needs were filled in many cases through foreign direct investment. It was often the provision of secure markets by the foreign investor that enables the financing to be raised.[99]

The major disadvantage of FDI in the resource sector was purported to be the tendency to ship minerals out of the host country at the 'raw' stage and, hence, to undertake the more labour-intensive processing activities in the home country. Nevertheless, brief mention was made of the issues that now dominate the FDI/nonrenewable resource sector debate: 'The extraction of resources can give their proprietor a return in excess of the cost of retrieval plus a fair or normal profit.'[100]

The report's recommendations were based primarily on ways of redressing the problems caused by the truncated firm. The best way of doing this, according to the report, was to set up a general screening agency that would attempt to negotiate, on a case-by-case basis, greater benefits for Canada than the investor would normally confer on the country in an unconstrained environment.[101] The process was to exhibit five basic elements:

i it should entail a cost-benefit analysis;
ii it should be done on a case-by-case basis;
iii it should involve a bargaining or negotiating process with foreign investors;
iv it should be carried out within a framework of policy guidance;
v it should be selective and concentrate on major transactions.[102]

In some ways, this was seen as a costless approach since, in theory, it is possible to extract a share (even all) of the investor's monopoly rents (generated by one or more of the attributes or 'advantages' enjoyed by the foreign firm) without altering the investor's behaviour.[103] In practice, as we shall see, this is virtually impossible to achieve.

At the same time as the Gray Report was being prepared, the Canadian government was forced to make two *ad hoc* decisions that are of significance to this study. First, in March of 1970, Prime Minister Trudeau announced that the federal government would block the attempted takeover of Denison Mines, Canada's major uranium producer, by the foreign-controlled Hudson Bay Oil and Gas Company.[104] It was stated that legislation would be utilized if necessary. Shortly thereafter, the Minister for Energy, Mines and Resources announced that all new uranium mines must normally be 67-percent Canadian owned.[105] The rationale for the action was based partially on concerns over security of supply and on the political sensitivity of the uranium issue. The second episode occured in 1971 when Ashland Oil attempted to take over Home Oil, the sole remaining Canadian integrated oil company; the federal government quickly responded by blocking the proposed acquisition.[106] Both of these events are important since they suggest that the Trudeau government was starting to view the nonrenewable resource sector as somehow different from the mainstream, i.e. as a *de facto* key sector.

Formation of an Integrated Policy

As a result of the furor raised by the above events, the Liberal Party came to believe that the majority of Canadians favoured restrictions on

FDI.[107] In response, the Trudeau government introduced, on 4 May 1972, a bill entitled 'The Foreign Takeovers Review Act' (FTR Act). However, the bill died on the order paper when the House was dissolved for the 1972 general election. It should be noted that the FTR Act only addressed the issue of takeovers by foreign interests of Canadian controlled businesses.

The election returned the Liberal Party to office, but this time in a minority government position. Shortly thereafter, the Foreign Investment Review Act (FIR Act) was introduced[108] presumably as part of the price extracted by the NDP for their support of the minority government. It differed from its predecessor in two major ways. First, the government now widened its screen to include new business initiatives, including expansions by existing firms into nonrelated business activities. Second, the government indicated that it would subject indirect takeovers to review; that is, the transfer of control of a Canadian-based business from one foreign interest to another.

The FIR Act was passed on 12 December 1973 and was enacted in two stages. Phase I, which related to takeovers, was enacted on 9 April 1974; the second segment, which sought to regulate new business and unrelated business activity, took effect on 15 October 1975. The legislation established an agency to assist and advise the minister responsible for the act. Before discussing the characteristics of the new agency, the Foreign Investment Review Agency (FIRA), let us explore the act in greater detail.

Outline of the Legislation

The legislation focuses on control of business entities.[109] It attempts to identify situations wherein corporate control passes to foreign interests, generally known as noneligible persons (NEPR).[110] In order for such transactions to be approved by Cabinet, they must be judged to be likely to be of 'significant benefit' to Canada. In general, a noneligible person is considered to be anyone who is not a permanent resident of Canada. Similarly, any corporation in which a single NEPR owns more than 5 percent of the voting shares, or NEPRS in aggregate own either (a) more than 25 percent of the voting shares of a company whose shares trade on a recognized stock exchange or (b) 40 percent of the voting shares of a closed corporation, is presumed to be a noneligible person.[111] For pragmatic reasons, I shall restrict myself to an analysis of corporations and the acquisition of control through the purchase of shares with voting rights attached. In this case, control is presumed to have passed to an NEPR if it purchases more than 5 percent of the voting shares in a public corporation or more than 20 percent of such shares in a closed (private) corporation. If this presumption is not refuted by evidence to the contrary, the transaction is subject to review.

Of particular relevance to the mineral sector is the fact that a mineral lease is not considered to be a business enterprise unless it is deemed to contain commercially viable reserves.[112] The significance of this interpretation of the act is not well known: it provides a foreign-owned mining concern with considerable scope for expansion without being subject to the review process.

The second type of investment that is potentially subject to review is the establishment of a new business venture by a noneligible person as defined above. Interestingly, a new business is defined to include the expansion of ongoing operations if the proposed incremental investment relates to a diversification into new lines of activities (denoted in the FIR Act as unrelated (businesses). According to guidelines published under the powers of the act on 2 August 1975 and 19 March 1977,[113] there are several criteria that can be employed by the applicant to demonstrate that the proposed expansion is of a related business nature:

i vertical integration (backward and forward integration from an established business);
ii the product or service of the new business is a substitute for the product or service of the established business;
iii the product of the new business is produced by essentially the same technology and the same production processes as are used in the established business;
iv the product, service, or new production process on which the new business is based is a result of research and development carried on in Canada by or on behalf of the established business;
v the industrial classification of the new business is the same as the industrial classification of the existing business (classifications are based on the Standard Industrial Classification Manual published by Statistics Canada).[114]

Investment proposals in most areas of the economy are required to meet only one of these criteria to attain related-business status. However, in the mining and petroleum industries, fira appears to operate as if point v, the SIC system, is the only relevant criterion. As a consequence, all mineral exploration and extraction activities are defined to fit within one of eight categories:

i metal mines (except uranium mines) and associated exploration;
ii uranium mines and associated exploration;
iii coal mines and associated exploration;
iv petroleum and natural gas and associated exploration;

v nonmetal mines (except coal mines), quarries and sand pits and associated exploration;
vi contract drilling for petroleum;
vii other contract drilling;
viii miscellaneous services incidental to mining.[115]

Under current practice, a foreign-controlled mining firm can expand unchecked within its given line(s) of business. For example, if at the time that this section of the act was enacted (15 October 1975), or through subsequent rulings, a firm is established within, say, both the petroleum and coal industries, it can develop as many new properties as it wishes in these areas (providing they are based on grass-roots exploration activity by the firm) without ever being subject to FIRA review. However, if it wishes to open a base metal mine, it must subject itself to review; similarly, if it wishes to purchase a coal deposit that has been sufficiently delineated to be classified as a 'business', it must also submit the proposal to FIRA for scrutiny.

The above discussion is of critical importance in my subsequent assessment of the relative merits of the Canadian and Australian approaches. The primary factors to remember are: the focus of the review process is the business enterprise, not the individual project; expansions of firms already established in a line of business are no longer subject to review; the mineral sector is disaggregated into a number of sub-sets for purposes of determining what constitutes a related business; and, once approval is given for a new mining business corporation within one of these classifications, all subsequent grassroots exploration and production activities within this grouping are free from scrutiny.

Significant Benefit Test

If a proposal is deemed to be subject to review, it must pass only one test in order to be approved by Cabinet: it must be found to be or likely to be of 'significant benefit' to Canada,[116] having regard to all of the factors listed under the act for this purpose. Given the importance of these factors or criteria to the current FDI/FIRA debate, they are presented verbatim:

> In assessing, for purposes of this Act, whether any acquisition of control of a Canadian business enterprise or the establishment of any new business in Canada is or is likely to be of significant benefit to Canada, the factors to be taken into account are as follows:
>
> i the effect of the acquisition or establishment on the level and nature of economic activity in Canada, including, without limiting the generality of the

foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada;

ii the degree and significance of participation by Canadians in the business enterprise or new business and in any industry or industries in Canada of which the business enterprise or new business forms or would form a part;

iii the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

iv the effect of the acquisition or establishment on competition within any industry or industries in Canada; and

v the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment.[117]

Although this list spells out the factors that are taken into consideration, they are so general as to allow the government to justify virtually any decision it wishes to make. This subject will be addressed in more detail later, but it now suffices to draw the reader's attention to point v: note that the act allows the Cabinet (read, in most instances, the Minister and/or FIRA) to take into account 'national industrial and economic policies'. Unfortunately, it is not obvious to the investor which policies are utilized in the decision-making process; this is of particular importance since many government statements tend to be somewhat contradictory.

Decision-Making Process

Technically, it is the Minister who makes the initial decision as to whether the 'significant benefit' test has been met,[118] and then takes the recommendation forward to the Cabinet for the ultimate decision. In practice, the Foreign Investment Review Agency (FIRA) is also a critical actor in the system, if for no other reason than its recommendations to the Minister are invariably accepted. This point has been noted in a recent Economic Council of Canada study wherein the then Commissioner of FIRA is quoted as stating: 'Without attempting any precision I would give as an indication that probably in 96 or 97 percent of cases the advice given by the agency is compatible with the Minister's recommendation to his colleagues.'[119] In response, Schultz *et al.* suggest that 'it is likely that the degree of compatibility is even higher than this — possibly approaching 99 percent'.[120]

The Minister has 60 days in which to recommend acceptance or rejection of the proposal. If an explicit decision is not made, the application is deemed to be approved. However, prior to the end of the 60-day period, the Minister can issue a 'notice' to the applicant requiring further information prior to making a decision.[121] Although many factors are undeniably at work, this open-ended decision-making process has resulted in protracted negotiations that have, on occasion, taken over 24 months to resolve.[122]

In March 1977, in order to speed up the process, a new 'short-form' application system was instituted for proposals involving less than $2 million in assets and fewer than 100 employees. In June 1982, the relevant figures were increased to $5 million and 200 employees.[123] Over the period 1977-80, roughly 80 percent of all proposals were within these guidelines but approximately one-third of such cases were 'bumped' into the standard review process due to the sensitivity of the application.[124] The short-form process is normally completed within one month and involves a much less onerous scrutiny. In fact, as Schultz *et al.* note: 'for these cases, it appears that the 'significant benefit' test really becomes a 'no detriment' test (although this has never been admitted to by any government official). . . . the use of this 'no detriment' test may be contrary to the statute.'[125]

The standard review process has been subject to intense criticism in recent years, especially since October 1980. One reason has been the extremely lengthy period required, on average, for processing an application; supporting evidence is provided by the following data on the average number of days required to process standard procedure cases for the years 1976-79:[126]

1976	100
1977	80
1978	90
1979	120

Although the recent streamlining of the short-form process and other administrative changes will reduce the severity of the problem,[127] it is apparent that the decision-making process is, itself, part of the problem. That is, a bargaining-dominated decision system virtually necessitates a lengthy period of analysis and review if it is to be thoroughly carried out. Before providing an elaboration of this point, let us briefly explore FIRA's case load and acceptance/rejection data. From table 4 it is observed that from the inception of FIRA in 1974 until 1982 the 'average acceptance rate' was 81 percent.[128] This varied little between the acquisition and new business categories; the corresponding values are 81.5 and 81.0 percent. In addition, from 1976 to 31 March 1980 the

TABLE 4

Percentage Distribution of Total Resolved Cases Under the Foreign Investment Review Act, 1974-82

Type	74/75	75/76	76/77	77/78	78/79	79/80	80/81	81/82	Total 74-82	1 April 82 – 31 Dec. 82[b]
Acquisitions:										
Allowed	68	72	80	91	88	86	73	79	82	90
Disallowed	13	14	10	4	8	7	12	11	9	3
Withdrawn	19	14	10	5	4	7	15	10	9	7
New businesses:[a]										
Allowed	—	67	80	89	87	87	80	65	81	79
Disallowed	—	0	7	4	6	7	9	11	7	8
Withdrawn	—	33	13	7	7	6	11	24	12	13
All cases:										
Allowed	68	72	80	90	87	86	76	71	81	84
Disallowed	13	14	8	4	7	7	11	11	8	6
Withdrawn	19	14	12	6	6	7	13	18	11	10

Source: Foreign Investment Review Agency, *Foreign Investment Review Act: Annual Reports* (Ottawa: Supply and Services, various years).

[a] The new business provisions of the act did not come into force until October 1975. While some cases were submitted in the calendar year 1975, none of these cases were resolved in that year.

[b] The data for the 1 April 1982 to 31 December 1982 period were obtained from Foreign Investment Review Agency, *Quarterly Statistics October – December 1982* (Ottawa: Supply and Services, 1982).

acceptance rate was relatively stable but it dropped appreciably in 1980/81 and 1981/82 to 76.5 percent and 71.3, respectively. Hence, the charges by the FIRA critics that the agency became more zealous in its application of the act after the Liberals returned to office in early 1980 appear to be supported by the data. On the other hand, the data for the first nine months of 1982/83 indicate a movement back to the pre-1980 decision record.

The corresponding decision information for the mineral sector is shown in table 5. Interestingly, the percentage of approvals is somewhat lower for acquisitions than for new business ventures: 66 versus 76 percent over the 1974-82 period. This is not surprising since it is much more difficult for an acquisition proposal to pass the 'significant benefits' test than it is for an entirely new resource-based activity. Although the small sample leads to substantial variation in the decision data, there appears to be little doubt that it became much more difficult to obtain Cabinet approval during the period 1980 to 1982, especially for acquisition proposals. Given the aggregated nature of the data, it is impossible to tell what proportion of these cases were subject to the National Energy Program (NEP).[129]

Although the above data suggest to some observers that the ministers responsible for the FIR Act, and FIRA itself, have been rather zealous in applying the 'significant benefits' test,[130] the reader must remember that only 10 to 20 percent of annual direct investment is thought to be subject to the review process.[131] The reason for this was noted earlier: expansions by established firms within their related lines of economic activity are exempt from the preview of the regulatory regime.

Criticisms of the FIRA Process

The most important criticisms of the FIRA process, in addition to the length of time required to process an application, are: the lack of precision and clarity in the rules; the excessive use of negotiated undertakings; and the related issue of evaluating a proponent's future activities that are not, in the eyes of the investor, related to the proposal under evaluation.[132]

Open-ended Guidelines and Bureaucratic Discretion

The five criteria which are listed in the act are the sole factors to be used in determining whether or not a project generates a 'significant benefit' for Canada. However, they are, from the applicant's perspective, open-ended and imprecise. Numerous groups have complained

TABLE 5

Percentage Distribution of Resolved Mineral Sector Cases Under the Foreign Investment Review Act, 1974-82

Type	74/75	75/76	76/77	77/78	78/79	79/80	80/81	81/82	Total
Acquisitions:									
Allowed	88.9	70.6	58.3	73.3	90.5	68.0	38.5	18.2	65.9
Disallowed	11.1	11.8	25.0	6.7	0.0	24.0	38.5	63.6	20.3
Withdrawn	0.0	17.6	16.7	20.0	9.5	8.0	23.0	18.2	13.8
New businesses:[a]									
Allowed	—	—	88.9	93.3	78.9	84.2	53.5	70.0	75.9
Disallowed	—	—	0.0	0.0	0.0	10.5	6.7	10.0	5.6
Withdrawn	—	—	11.1	6.7	21.1	5.3	40.0	20.0	18.5
All cases:									
Allowed	88.9	70.6	71.4	83.3	85.0	75.0	46.4	56.1	70.9
Disallowed	11.1	11.8	14.3	3.3	0.0	18.2	21.4	24.4	13.5
Withdrawn	0.0	17.6	14.3	13.4	15.0	6.8	32.1	19.5	15.6

Source: Foreign Investment Review Agency, *Foreign Investment Review Act: Annual Report* (Ottawa: Supply and Services, various years).

[a] The new business provisions of the act did not come into force until October 1975. While some cases were submitted in the calendar year 1975, none of these cases were resolved in that year.

that a potential investor has great difficulty in determining, before the fact, whether or not a project has a reasonable chance of success.[133] As a result, it is claimed that many potential applicants do not even bother with the FIRA process; such a response is of course intertwined with the knowledge that an application, even if successful, will entail a lengthy and costly process.

Some critics would like to see FIRA issue regular policy statements so that the applicant can gain some appreciation of the trade-offs between the various criteria utilized by FIRA in its decision-making calculus.[134] In response, it can be said that the rules must be broad in order to treat fairly the differences between applicants, between and even within sectors. Nevertheless, it was the government's original intention to develop a more precise set of criteria based on operating experience.[135] Indeed, the Gray Report called for an articulated industrial strategy, to provide guidance to both the bureaucrats and potential investors with respect to the government's preference.[136] This approach has been, with the possible exception of the NEP, almost totally absent.

On the other hand, Schultz *et al.* state that:

> It can be argued that the process is not as *ad hoc* as it appears to outsiders, because FIRA officers have not only the statute and policy statements but also the Cabinet and interdepartmental policy 'understandings', discussed above, to guide them. The fact remains, however, that for those outside the process including investors, unless they have been so unwise as to not choose members of the FIRA Bar, i.e., those who specialize in the process and who may be more aware of 'understandings' and informal criteria, to aid them in the review process, the process is highly *ad hoc*.[137]

This problem is made more severe by the fact that reasons for refusals are not made public. Indeed, it is only very recently that FIRA, with investor consent, has started to publish the nature of the outcomes of some of the bargaining process. Before I turn to this interesting phenomenon, I wish to address the nature of the prior quote: the presumption that interested observers can, if they look hard enough, determine government policy.

Foreign Investment Policy and the Mineral Sector

The first element of the current informal foreign ownership policy with respect to the mineral sector took place on 2 March 1970 when Prime Minister Trudeau announced in the House of Commons that the federal government would block, through retroactive legislation if necessary, the attempted takeover of Denison Mines by Hudson Bay Oil and Gas, at that time controlled by U.S. interests.[138] Shortly thereafter, the Hon.

J.J. Green, then Minister of Energy, Mines, and Resources, indicated that henceforth new uranium ventures were to be at least two-thirds Canadian owned; this was, of course, constrained by the usual 'grandfather clauses'.[139] In 1978, the policy was restated when it was included within the Uranium and Thorium Mining Review Act;[140] this legislation subsequently died on the order paper and has yet to be reintroduced. Nevertheless, it was a clear expression of government policy although it has never been explicitly stated that this policy should be viewed as a directive to FIRA. However, it has undoubtedly been interpreted as such by the review agency.

In 1971, the federal government once again blocked an attempted takeover of a Canadian resource company: Home Oil, the last remaining domestically-owned integrated oil company.[141] This action undoubtedly stimulated the development of a takeover regulatory regime but has otherwise not been of major relevance in the FDI debate.

Perhaps the single most important policy announcement with respect to FDI policy in the nonpetroleum mineral sector took place on 28 June 1974 when Prime Minister Trudeau stated:

> The Liberal Party of Canada sets as an objective that new major resource projects in the natural resource field should have at least 50 percent and preferably 60 percent Canadian equity ownership.[142]

Equally important for purposes of this study, Mr. Gillespie, then the Minister responsible for the FIR Act, repeated the Prime Minister's message in the House of Commons on 10 October 1974.[143] He went on to state that mining was one of the activities covered by the term 'resource projects'. At this time, it is useful to note the level of FDI in the mining industry when these policies were formulated. From table 6, note that in 1974 48.8 percent of assets and 47.2 percent of equity were foreign owned but, interestingly, only 34 percent of profits were generated by these same firms.[144]

From table 7, it is apparent that since 1974 the level of foreign control in the nonenergy mineral sector has continuously declined. Nevertheless, recent events have increased the policy significance of this sector: the post-1973 oil price increases generated a sharp rise in oil company profits; this in turn triggered a substantial increase in coal and uranium prices and raised the issue of economic rents in the nonpetroleum sector. The federal government responded by thoroughly reviewing its policies with respect to security of supply, economic rent and foreign ownership.

Perhaps the basic issue was the expectation that FDI in the nonpetroleum energy minerals (coal and uranium) could rise dramatically in response to both the expected shift away from oil to alternative energy sources and the major increase in oil company cash flow. If this were

TABLE 6

Ownership of the Canadian Mining Industry, 1974

	United States		Other Foreign		Canadian		Unclassified		Total
	$	% of total	$	% of total	$	% of total	$	% of total	$
Assets	5,507	39.5	1,155	8.3	7,138	51.2	143	1.0	13,943
Equity	2,792	37.7	594	8.0	3,980	53.8	42	.5	7,407
Sales	2,793	40.0	531	7.6	3,568	51.1	87	1.2	6,979
Profits	477	26.7	131	7.3	1,180	66.0	–7	–	1,781

Source: Derived from Donald J. Patton, 'The Evolution of Canadian Federal Mineral Policies', in Carl E. Beigie and Alfred O. Hero, Jr., *Natural Resources in U.S.-Canadian Relations, vol. 1, The Evolution of Policies and Issues* (Boulder, Colorado: Westview Press, 1980) p. 235.

Note: The table was derived by subtracting the figures for mineral fuels from those for total mining. The amounts in the table represent: metal mines; nonmetal mines except coal mines, quarries, and sand pits; and services incidental to mining.

TABLE 7

Foreign Control Ratios for Nonfuel Mining Sector (Assets)[a], 1969-78 (percent)

Year	Foreign control proportion
1969	60.2
1970	62.3
1971	62.3
1972	48.2
1973	47.4
1974	46.7
1975	46.7
1976	44.4
1977	42.1
1978	40.0

Source: Department of Energy, Mines and Resources, *Mineral Policy: A Discussion Paper* (Ottawa: Supply and Services, 1981) p. 60.

[a] Excludes coal and iron and steel mills, includes uranium.

to occur, it could lead to a situation wherein much of the economic rent from the nation's resource exploitation would accrue to nonresidents. It would appear that this logic was accepted by the Prime Minister and federal government policy makers in the post-1973 period.

Initially, as expected, most of the policy attention was focused on the oil and gas industry. In 1976, the Government of Canada, in its report entitled *Energy Strategy for Canada*, called for a substantial increase in the level of Canadian ownership of the petroleum sector.[145] A year later it took steps to ensure greater Canadian participation in the development of oil and gas reserves on Canada Lands. More importantly, in 1978 the federal Cabinet purportedly passed a resolution formally accepting the Prime Minister's 1974 statement calling for at least 50 percent and preferably 60 percent Canadian ownership in all new resource projects.[146] Although knowledge of this decision was disseminated within the bureaucracy, it was never formally announced as government policy.

The major policy thrust of the government was encompassed in the National Energy Program as announced in October 1980.[147] Although primarily directed towards the oil and gas industries, it is important to the nonpetroleum sector in other ways since it indicates the types of factors considered to be of relevance in calling for increased Canadian ownership.

First of all, the importance of the economic rent issue is stressed:

> The continued increase in oil and gas prices that will occur means a further large foreign wealth transfer from Canadians to foreign shareholders. By ignoring the problem of foreign ownership in the past, Canadians have lost a significant share of the benefits of having a strong resource base. If we fail to act now, Canadians will lose once again.[148]

Further, the above noted concerns with respect to the possibility of international oil companies using their internally generated cash flow to acquire interests in other areas of the mineral industry is noted:

> From a Canadian ownership perspective, the current policy of providing the industry with all of the funds it needs in the form of internally-generated cash flow is undesirable. It allows a largely foreign-owned industry to expand substantially without having to seek funds from the Canadian capital markets; thus there is little financial pressure on the industry as a whole to involve new Canadian participation. As the industry's revenues increase, it could expand into other sectors of the economy.[149]

The specific policies of NEP are noted herein since there was widespread belief, in the 1980-81 period, that similar initiatives might be applied to the mineral sector.[150] The principal objectives of NEP were said to be:

i *Ensure active development of oil and gas rights.*
The Canada Lands are increasingly attractive. Important discoveries have already been made, and numerous promising geological structures remain to be tested. In return for the privilege of rights to these lands, vigorous and sustained exploration and development efforts should be expected.

ii *Reserve to the Crown a 25-percent interest in every right on Canada Lands.*
This interest will be exercised by Petro-Canada or some other designated Crown corporation, and will be in the form of a carried interest, convertible to a working interest at any time prior to the authorization of a production system for a particular field. It will be applicable to all existing interests, however acquired.

iii *Increase Canadian ownership.*
A minimum of 50 per cent Canadian ownership — private or public sector — will be required for any production from Canada Lands.

iv *Ensure that a high level of Canadian goods and services is employed in oil and gas activities carried out on Canada Lands.*
Applicants for exploration and production rights will have to demonstrate how their operations will bring industrial and employment benefits to Canadians, both in the region of interest and elsewhere in Canada. Where applicable, companies will be expected to put in place special training and employment measures, particularly for native Canadians.

v *Ensure that Canada receives a fair share of the economic rent.*
In addition to a basic royalty of 10 percent, a Progressive Incremental Royalty will be established, based on the profitability of each production field.[151]

Although the federal government has recently attempted to dispel the notion that such policies will be applied to other sectors of the economy, such action may still occur.[152] A major reason for this belief is that NEP went out of its way to express concern about the nonpetroleum energy sector:

> The Government is concerned about ownership trends in the non-petroleum energy sector. The problem is less severe in this area, but Canadians would not be wise to let the pattern of ownership that occurred in the oil and gas industry repeat itself in the uranium and coal industries. In the uranium industry, the Government will continue to insist on a Canadian ownership level of at least 67 percent. The Government is anxious to ensure that the coal industry does not become dominated by foreign-controlled firms. It has already

indicated that any coal liquefaction plants will have to meet a Canadian ownership test.[153]

For purposes of this study, one of the most interesting aspects of the NEP was that, for the first time in the FDI debate, the federal government explicitly directed FIRA to take the NEP's Canadianization targets into account when assessing oil and gas proposals with respect to the 'significant benefit' test. This directive reads as follows:

> The Foreign Investment Review Act (FIRA) will also continue to play a key role in ensuring the Government's Canadianization goals. Firms that are foreign controlled will continue to be non-eligible firms for FIRA purposes. Moreover, the Foreign Investment Review Agency will vigorously enforce its investment criteria in the energy sector. The Government does not want to see the oil companies use their cash flow to expand into the non-energy part of the economy. Nor does it want foreign-controlled firms to buy already-discovered oil and gas reserves.[154]

The latest comprehensive expression of the Government of Canada's view on the issue of foreign direct investment in the mineral sector can be found in *Mineral Policy: A Discussion Paper*[155] released by Mrs. Erola, Minister of State (Mines), on 8 March 1982. The report notes that the level of foreign ownership and control in the nonpetroleum mineral sector is substantially lower than in the oil and gas industry (see table 8). Equally important, the degree of Canadian control has been increasing steadily since 1972 (see table 7).[156] Despite being satisfied with the present (December 1981) levels of Canadian owner-

TABLE 8

Canadian Mineral Industry Foreign Ownership (Percent)

Subsectors	Sales	Assets
Oil and gas	81.7	63.8
Coal	60.2	71.5
Nonferrous metals	34.7	27.4
Ferrous metals	26.3	33.3
Nonmetallic minerals	66.1	58.6
Total nonpetroleum sector	36.4	36.1

Sources: Department of Energy, Mines and Resources, *Mineral Policy: A Discussion Paper* (Ottawa: Supply and Services, 1981) p. 59; *Canadian Petroleum Industry Monitoring Survey*, 1979. Statistics Canada, CALURA 610210 (Preliminary 1978).

ship in the mining industry, the Mineral Policy paper sounds a note of caution:

> However, a policy of maintaining existing levels of Canadian control is not a task without challenge since there are dynamic forces at play that have the capacity to increase foreign control. These include:
>
> i Increasing domination by major resource corporations of the exploration phase of the mineral cycle, with obvious implications for increased foreign ownership as any resultant mineral discoveries are developed;
>
> ii Decline of the Canadian owned and controlled junior mining sector. This sector has been largely oriented to exploration, but it is also the source of new entrants into the senior producer category; and
>
> iii Increasing interest of petroleum companies, largely foreign owned and controlled, in mineral exploration, development and production.[157]

The report then goes on to give its concluding comments with respect to the FDI issue:

> These developments indicate the need for monitoring future levels of foreign ownership in the mineral sector. However, because of the current high level of Canadian ownership, no new measures to strengthen the Foreign Investment Review Agency's (FIRA) operations or policies in the mineral sector appear necessary *at this time*.[158]

It is rather remarkable that the report makes no reference to Canadian ownership targets for all new resource projects as ennunciated in 1974 by the Prime Minister and reiterated in 1978 by the Cabinet. Even the then Commissioner of FIRA, Gorse Howarth, drew attention to the policy in a November 1980 speech in New York City.[159] The temptation to state that perhaps it is no longer government policy should be resisted since Mrs. Erola, as recently as 21 October 1982, is reported to have stated, citing a policy in effect since 1974:

> Foreign investors planning joint ventures or other investments in Canada must ensure that Canadians have a major stake in the development. The Government wants to see at least 50 percent Canadian ownership, but it may be prepared to accept less if the overall investment passes a 'significant benefit' test.[160]

In this section I have attempted to trace through the major elements of federal government policy with respect to foreign direct investment in the mineral sector since 1970. Let us now see how these policies have influenced FIRA and consequently foreign investors.

FIRA and Mineral Policy

As noted above, one of the five criteria used in making the 'significant benefit' test reads, in part: 'the compatibility of the acquisition or establishment with national industrial or economic policy'. Hence, one would expect FIRA to take the policies discussed in the prior section into account when assessing applications in the mineral sector. Indeed, they appear, to some extent, to have done so.

For instance, the 67-percent Canadian ownership rule for the uranium mining industry is freely acknowledged by FIRA as being government policy for FDI review purposes.[161] Similarly, the publicly released directive to FIRA to consider the NEP in the same fashion is widely known. Unfortunately, the extent to which FIRA views the Prime Minister's 1974 pronouncement in which he called for at least 50 percent and preferably 60 percent Canadian ownership of all new resource projects is unknown. As mentioned earlier, the Commissioner of FIRA noted in 1980 that FIRA acknowledges this speech as government policy in the energy field;[162] however, the original pronouncement, as well as the 1978 Cabinet reaffirmation, relates to all mining projects. Nevertheless, it appears as if since 1980 (and the NEP), FIRA has attempted to ensure that all new coal enterprises agree to abide by the '50/60-percent rule' initially or within a given time, usually 5 years.[163] Indeed, there is some hearsay evidence to suggest that FIRA has also sought, albeit somewhat less zealously, to apply the rule to all nonenergy mineral projects through restrictions on new business entities which are subject to review.[164] Given the lack of public articulation of the '50/60-percent rule' outside of the bureaucracy, it is not surprising that investor hostility has arisen: there is a belief on the part of some participants that FIRA is indirectly applying the NEP to the mineral sector, notwithstanding its public statements to the contrary.

What is needed is an explicit policy statement, similar in some respects to the approach taken with respect to the Canadianization objectives of NEP, clearly delineating government policy in this area. The current system raises undue uncertainty, confusion and hostility. Even more importantly, the lack of clarity in the rules makes it difficult for foreign investors to know if they are being treated fairly, compared with other applicants.

Before leaving this discussion, it must be stated that FIRA has been placed in a very difficult position. First, the government, for one reason or another, has chosen not to articulate its 50/60-percent rule policy widely and, even more importantly, not to present it publicly as a directive to FIRA. Nevertheless, it appears that the agency has been informally told to treat the 1978 Cabinet decision as a broad policy target that should be pursued wherever and whenever it is feasible to do so.

Equally important from a societal perspective is that the FIR Act does not facilitate attainment of the 50/60-percent rule. Recall that only takeovers and new business activity, including expansions by existing firms into nonrelated activities, by noneligible persons, are subject to review. This means that a firm once established within a line of business can expand without ever subjecting itself to review. For example, this means that most of the major oil companies such as Esso, Shell, Gulf, Texaco, B.P., Superior Oil, and Conoco can expand their coal operations through grass-roots activity without restriction. Interestingly, virtually all of these firms have vast tracts of undeveloped coal reserves.[165] It is this phenomenon that undoubtedly led Energy, Mines and Resources to mention the coal industry as a potential problem in its NEP document and to refer to the problem indirectly in its recent mineral policy discussion paper.

The problem facing the Minister responsible for the FIR Act and FIRA is now obvious: the Minister is expected to work towards ensuring that all new projects are 50 to 60 percent Canadian owned, but lacks an appropriate legislative base to achieve this goal. This phenomenon is not without ramifications for the mining industry. It means that those firms not already established within the industry are likely to be subject to a more intensive scrutiny than would be the case if each one were subjected to review. From this follows the observation that, rather than the current review process being biased against American investors, as is sometimes promulgated by the U.S. press, it is the new entrants, the Japanese, South Koreans, West Germans, and French, that are most likely to be penalized. This follows from the fact that most American interests are already firmly established in a nonreviewable form.

Equally important is the possibility that the current system could inadvertently lead to an increasing proportion of FDI in Canada being owned by U.S. interests. It has been noted previously in this study that the non-economic objections to FDI would be less severe if the investments were diversified across many countries rather than concentrated as it is now in the hands of American corporate interests. In other words, the distribution of FDI may be as important as it's absolute level in terms of policy debate. In summary, FIRA faces an impossible situation. It is expected to follow a policy that is not widely known and for which it lacks a legislative base.

The Bargaining System

As noted by the Gray Report, the essence of a general screening mechanism is a bargaining process.[166] This is predicated on a benefit-cost framework. According to the analysis presented by Gray, FDI is seen to possess a number of attributes which generate either a positive or negative impact on the final calculation: the level of net benefit of the proposal. Based on the 'internalization' and 'advantages' model of the MNE, it follows that firms undertake FDI because of a competitive advantage that they possess *vis-à-vis* domestic firms. The purpose of the screening process is essentially to capture some of the rent generated by these 'advantages' for the benefit of the nation. As suggested earlier, the approach has greatest merit in the context of the truncated firm thesis, and hence in the manufacturing sector. Nevertheless, given the absence of a key-sector approach or sector-specific rules, FIRA must apply the bargaining approach across the board.

In the mineral sector it is used to extract promises with respect to future undertakings in many areas,[167] the most important of which are:

i further processing;
ii exploration activity;
iii number of foreign employees;
iv research and development activity;
v use of Canadian produced inputs;
vi Canadian equity participation in the project under appraisal and in future corporate activities;
vii restrictions on resales of property.

The bargaining system generates investor hostility because the rules of the game are not specified; the nature of the trade-off relationship between various criteria is unknown; and the extent to which financial exigency is taken into account when enforcing the undertakings is unclear. Most importantly, items **i** through **v** appear to be objectives that should be pursued by way of nondiscriminatory policies with respect to corporate ownership, if they are to be sought at all. This commentary, however, ignores the politics of the situation.

On the other hand, most foreign investors, with the possible exception of those from the USA, come from domains which restrict foreign access to natural resources in one form or another. Hence, the idea of FDI restrictions and Canadian equity participation requirements are not, *per se*, alienating. What is troubling is that the level of such participation is itself subject to bargaining, particularly the time period in which it is to be instituted and the restrictions of future activities.

This last point deserves elaboration. Given FIRA's mandate to pursue the 50/60-percent rule where feasible, the agency will attempt to ensure that new business enterprises possess a significant degree of Canadian equity. However, FIRA appears to have interpreted this target as a negotiable item. More troubling to investors is the attempt by FIRA to obtain undertaking from the proponent to ensure that future developments within a given sector, say coal, will also contain a given percentage of Canadian equity. This tends to upset applicants since they do not perceive the negotiations to be related to the activities under scrutiny.

On the other hand, as noted previously, it is only through the use of such restrictions that FIRA can hope to make any headway towards meeting the Cabinet's desires to ensure that *all new* projects contain 50 to 60 percent Canadian content. Even so, FIRA is still dealing only with a sub-set of projects, since many foreign interests (those expanding within a related business activity) do not have to subject their proposals to review.

Perhaps the best way to illustrate the nature of the bargaining process is to relate the terms of recent undertakings. Before doing so it must be stated that it is only within the past year that FIRA has started to publish with any degree of regularity the nature of selected undertakings. This action goes a long way towards meeting some of the objections to the process especially those related to its secrecy and *ad hoc* nature. By this mechanism new investors obtain some idea of what is expected of them and past investors obtain some idea of the fairness and stability of the decision-making process. In fairness to FIRA, it should be stressed that the secrecy provisions of the act allow information to be published only with an applicant's consent; apparently most proponents have been hesitant for reasons of commercial confidentiality to have undertakings released.[168] However, as a result of the intense pressure recently placed on the agency, FIRA has apparently coerced a number of applicants to grant permission to release limited information on the terms and conditions of undertakings.

On 16 July 1982, the Minister responsible for FIRA issued a press release in which he outlined some aspects of the undertaking agreed to by British Petroleum Company Limited in order to obtain permission to acquire Selco Inc. of Toronto, which was formerly a subsidiary of Selection Trust Limited also of the U.K.[169, 170] Selco is a firm engaged in exploration for and production of minerals. Among the undertakings agreed to were:

- that Selco would increase its exploration program from an annual average of $3,235,000 in 1977-1980 to approximately $7,000,000 per year in 1981 and in 1982, and continue to carry out exploration at the 1981-1982 level through at least 1986, subject to the normal competitive and commercial considerations that guide the timing and size of exploration activities;
- that the metal concentrates from the Selbaie mine, and from any other mine which may be developed by Selco in Canada in the future, will be processed in Canada, subject to processing facilities being available and prices being competitive;

- that Selco will purchase from Canadian sources all equipment, parts, supplies and services which it and its subsidiary and holding corporations may require (including the new lime kiln and new coal reclamation plants) where availability, quality, delivery and price are competitive;
- that Selco would sell to Canadians at fair value, within five years, such number of voting shares of Selco as will result in Canadians holding not less than 30 percent of the voting shares of Selco;
- that Selco would sell to Canadians at fair value, before commencement of commercial production, such participation in each of its new major natural resource projects as will result in Canadians holding an aggregate direct and indirect interest of at least 50 percent in such projects;
- that Selco would not purchase any interest sold to Canadians in its shares or in its projects;
- that two thirds of the directors on the board of Selco will at all times be Canadians;
- that all operating officers and managers of Selco will be recruited in Canada at all times and that they will have full autonomy in conducting the company's day-to-day operations;
- that Selco's research and development budget would be increased from the 1980 level of $800,000 to $1.5 million in 1982 and an average of $1.5 million a year for five subsequent years.[17]

This agreement is purportedly representative of those now being negotiated with firms in the mineral sector.

Summary

The critics argue that as a result of the extreme uncertainty associated with the guidelines, the alienating nature of the bargaining process, and the time and money required to carry out the process, many potential investors are deterred from investing in this country. This suggests that the imposition of a clear set of rules would facilitate both the economic nationalist's aspirations and those of the investment and business community. Clearly the present system, with its lack of rigid criteria and its secret undertakings, fails to generate the support of those it was designed to appease. Similarly, the system offers virtually no advantages to the foreign direct investor with the exception of the existing foreign firm expanding within a related business area.

I have attempted to show how this last point, when viewed in conjunction with the major policy objective of FIRA in the mineral sector, i.e. the 50/60-percent rule, encourages the agency to pursue Canadian equity objectives aggressively, by restricting foreign ownership levels in subsequent projects to be undertaken by new business enterprises subject to review. Such actions generate unnecessary hostility, especially since few investors are even aware, before the fact, of the 1978 Cabinet resolution on the subject.

The next three chapters will provide a review of the Australian approach. To reiterate some of the reasons stated in chapter 1, the comparison is appropriate because: Australia and Canada are the only two countries in the so-called western world that employ a general screening system; Australia also pursues an objective of a minimum of 50-percent domestic ownership in *all new* resource projects; the Australian approach appears to be widely accepted both by the domestic voter and the international investment community. Hence, the obvious question is: how can these somewhat similar schemes, with apparently similar objectives in the mineral sector, generate such disparate political outcomes? I shall now turn to the task of answering this question.

4. Historical Development of the Australian System

Introduction

The purpose of this chapter is to trace the evolution of the policies of the Australian government towards foreign direct investment in the nonpetroleum mineral sector. However, before directly undertaking this assignment, I shall first present some historial data on ownership and control trends in the area.

Foreign Ownership and Control Data: Mineral Sector

The information presented in this sub-section draws heavily on the work of McKern[172] and Barnett.[173] The magnitude of foreign direct investment, regardless of method of measurement, increased dramatically from 1963/64 onwards. From tables 9 and 10, it is apparent that foreign ownership of the Australian mining industry increased from 27 to 50 percent over the period from 1963 to 1974/75. Even more dramatic was the more than five-fold increase in the proportion of foreign ownership found within the fuel mineral industry (oil, gas, coal and uranium): 11.5 to 54 percent.

From table 10, it can be seen that foreign ownership levels vary significantly across industries. For instance, in 1972/73, 68 percent and 61 percent of the bauxite and petroleum sectors were foreign owned; the corresponding figures for black coal and uranium were 39 and 23 percent, respectively.

To this point the discussion has focused on ownership, but equally important from a public policy perspective is the issue of foreign control. The latter term is defined by the Australian Bureau of Statistics as follows:

> an operation is considered to be entirely under foreign control if the foreign direct ownership exceeds 50 percent, or if direct ownership by a foreign entity exceeds 25 percent and there is no Australian parent company holding a greater equity interest in the venture.[174]

TABLE 9

Foreign Ownership[a] of the Australian Mineral Industry, 1963-75 (Percent)

Year	Metallic Minerals	Fuel Minerals	Other Minerals	All Minerals
1963	39.8	11.5	13.8	27.3
1964	40.6	14.2	14.6	30.0
1965	43.6	20.2	17.2	34.0
1966	46.3	23.1	18.9	37.6
1967	50.0	25.6	19.6	40.9
1968	51.0	32.3	20.0	44.0
1971/2	53.4	51.1	10.7	48.7
1972/3	52.3	54.0	13.6	49.6
1973/4	50.8	55.8	15.8	49.8
1974/5	49.8	59.6	16.8	51.8

Source: Donald W. Barnett, *Minerals and Energy in Australia* (Sydney: Cassell Australia, 1979), p. 292.

[a] Foreign ownership is measured as the proportion of value added attributable to foreign equity holders.

It is apparent from table 11 in chapter 5 that a greater proportion of the Australian mineral sector is foreign controlled than foreign owned;[175] however, the rate of increase in the former statistic has been slower than that associated with the latter. Note that by 1974/75 over 60 percent of the mining industry was foreign controlled. Further, it is clear that most of the increase over the preceding ten years is attributable to fuel minerals, wherein the proportion of the sector that is defined to be foreign controlled rose from 15.5 to 74.5 percent.

Regardless of the measure used, it is obvious that the level of foreign participation escalated rapidly throughout the 1960s. Hence, as the decade progressed, so did the intensity of public debate over foreign ownership and control. I shall now turn to a discussion of these events.

Historical Development of Foreign Investment Policy

In general, the subject of foreign direct investment in the Australian economy did not become a serious political issue until the latter part of the 1960s. Nevertheless, a number of important events took place over the preceding years that influenced the evolution of Australian political thought on the subject.

TABLE 10

Foreign Ownership[a] *of Major Mineral Sectors in Australia, 1971-75 (Percent)*

Mineral Sector	1971/2	1972/3	1973/4	1974/5
Bauxite	67.7	68.0	n.a.	n.a.
Copper	52.7	51.2	n.a.	n.a.
Iron ore	59.9	61.1	57.6	55.1
Mineral sands	56.7	47.6	39.6	37.3
Nickel	36.8	35.6	n.a.	n.a.
Silver-lead-zinc	52.0	n.a.	48.1	49.3
Tin	29.2	34.6	34.2	37.3
Black coal	33.0	39.0	53.4	62.1
Petroleum	n.a.	61.0	58.0[b]	55.8[b]
Natural gas	n.a.	63.7		
Uranium	n.a.	23.0	23.0	23.0

Source: Donald W. Barnett, *Minerals and Energy in Australia* (Sydney: Cassell Australia, 1979), p. 293.

[a] Foreign ownership is measured as the proportion of value added attributable to foreign equity holders.

[b] Includes brown coal that is 100 percent Australian owned.

As Arndt[176] suggests, FDI has been of crucial importance to Australia since the start of European occupation in 1788. However, it was not until the depression of the 1930s that the economic and social costs of FDI were widely recognized; despite giving rise to a discussion of such issues as international indebtedness and the repatriation of profits, no formal initiatives were taken to address these concerns.

The first concrete action was taken in 1939 when, for wartime purposes, all investment in Australia was subject to capital issue controls.[177] At the same time, foreign exchange controls were in effect. The general acceptance of the latter policy provided future governments with a powerful regulatory device by which it could readily enforce a 'voluntary set of foreign investment guidelines'.

From 1945 to the late 1960s, the Australian government actively promulgated an open door policy towards foreign investment. For example, in 1952 the Treasury issued a policy statement which said in part that 'the participation of overseas capital in the development of industrial enterprise is welcomed'.[178] Nevertheless, by 1959 public concern was aroused by 'evidence of widespread restrictions imposed by overseas companies on export franchises of their Australian subsidiaries'.[179] Later in that year, the Tariff Board suggested the existence of a potentially serious transfer pricing problem but it was subsequently decided that the issue could be adequately handled by the Taxation Commissioner. The first official sign of concern was given in 1964 when Prime Minister Menzies appointed a Committee of Economic Inquiry (known as the Vernon Committee) to investigate, among other issues, the costs and benefits of overseas investment. In the following year, Mr. Menzies further acknowledged the build-up of public sentiment by stating that he 'would be much happier if all foreign investors who came to Australia were willing to admit Australians to some share in the equity of the business'.[180]

In May 1965, the Vernon Committee released its report. According to Arndt, it:

> conceded much to the critics of overseas investment. While stressing that 'overseas investment has . . . been a force assisting the growth of the economy', it came to the conclusion that 'an increase above the recent level of new overseas investment is to be avoided if possible'.[181]

The report also warned the government that it should be cognizant of the public's sympathy for economic nationalism: 'such feelings go deep and cannot be ignored'.[182] In the main, the Vernon Committee report was neglected by the government.

Undoubtedly, John Gorton did more to stimulate the policy debate of foreign investment issues than any other Prime Minister to that time. During his relatively short tenure in office, December 1967 to March 1971, a number of significant policy initiatives were undertaken. First, as the result of an apparent takeover attempt of a medium-sized Australian-owned insurance company, MLC Ltd., Mr. Gorton blocked the move; as a consequence, the insurance field was turned, de facto, into a key sector. The second major event took place approximately one year later. On 16 September 1969, Mr. Gorton announced restrictions on the ability of foreign firms to borrow funds in the domestic market. As a result, 'a company was allowed to raise in Australia a proportion of its total new borrowings according to the proportion of Australian-held equity in the company, with the Australian equity being weighted, on a four-to-three basis. For example, the proportion for an enterprise with a 30-percent Australian equity was 40 percent'.[183] The obvious intent of this policy was to encourage foreign-owned firms to admit or to increase domestic equity participation.

The third event of note was admittedly of minor importance in the overall Australian debate but it should be of significant interest to followers of the attempts by the Canadian government to increase domestic ownership in its oil and gas industry. In June 1969, the Gorton government introduced a bill which reduced the oil search subsidy to companies with less than 51 percent Australian equity.[184] The intent of the program was to encourage foreign oil exploration firms to Australianize: there is obviously a strong parallel between this policy and that encompassed in the Petroleum Incentive Performance Grants under Canada's National Energy Program of 1980.

The fourth action by the Gorton regime that is relevant to this study took place on 16 September 1969 when 'the Government expressly reserved the right to prevent foreign takeovers considered to be contrary to the national interest'.[185] This was an important event because: first, it indicated explicitly that the Australian government no longer viewed all foreign investment to be inherently beneficial to the nation's welfare; and secondly, it unveiled, for the first time, the 'not contrary to the national interest' test, which continues to serve as the reference point for those foreign investment proposals subject to review. The term 'national interest' was not defined by the Gorton government.

On 17 September 1970, Mr. Gorton again made an announcement in which another key sector was implicitly identified: uranium mining. He indicated that the government would introduce legislation to ensure that Queensland Mines Ltd. and Kathleen Investments, owners of the rich uranium orebody at Nabarlek, Northern Territory, would not be subject to foreign takeover. This event represents the first mineral specific action by an Australian government in the foreign investment domain. Of equal interest to this study is that Gorton acted largely for reasons of economic rent appropriation; that is, the government wanted to ensure 'that the full benefits of the discovery accrued to Australians'.[186] Before leaving this discussion, it is interesting to note that earlier in 1970 Mr. Trudeau announced that the Canadian government would, if necessary, introduce legislation to block the sale of Denison Mines to foreign interests.

In 1971, the intensity of the FDI debate picked up and generated political pressure which the new Prime Minister, Mr. McMahon, found difficult to ignore. Finally, in November, the Treasurer announced that he had asked his department to explore the FDI issue. Shortly thereafter, on December 10, the Senate Select Committee on Foreign Ownership and Control was established to inquire into and report upon foreign ownership and control in a number of areas of the Australian economy including resources. The Committee's report was released in October 1972; among its recommendations were the following: 'that urgent consideration be given to determining key strategic or sensitive areas where it is considered that foreign investment should be limited or excluded'.[187] In the intervening period, the Treasury study, *Overseas Investment in Australia*, was also released. Although conscientiously avoiding controversial policy recommendations, the nature of the discussion and the supporting data indicated that recent events gave some cause for concern from a public policy perspective.

Faced with an upcoming federal election campaign in which the opposition, the Australian Labor Party (ALP), appeared to be intent on appealing to the escalating sentiments of economic nationalism, the McMahon Government introduce a relatively comprehensive screening process for takeovers. It was to be based on both legislation and administrative mechanisms, with a purportedly independent review authority to be established to advise the Treasurer.[188]

The required legislation, entitled the Companies (Foreign Takeover) Act, October 1972, and henceforth referred to as the CFT Act, was enacted on 9 November 1972. The act was to facilitate a review of all takeovers in which control was deemed to have passed from a resident to a foreign interest. In such cases, approval was to be granted if the transfer was found to be 'not against the national interest.' Although it is not my intent to dwell on past legislation, it is important to expand upon the key terms listed above since they have continued to be integral components of all subsequent review procedures. In addition, such a discussion serves to emphasize the gradual evolution of the Australian FDI regulatory process.

The terms that require elaboration are: foreign interest, transfer of control, and 'contrary to the national interest'. Let us consider each in turn.

Foreign Interest and Transfer of Control

According to Sexton and Adamovich, the concept of effective control can be interpreted as:

> The fundamental concept of effective control of a company (the proposed assumption of which activated an order of prohibition if its exercise was considered contrary to the national interest) was premised on the ability to control, with associates, if such existed, at least 15 percent of the voting stock in the case of a foreign person or corporation, or 40 percent in the case of two or more foreign persons or corporations.[189]

Sexton and Adamovich further elaborate upon the concept of a foreign corporation:

> It was deemed to be a corporation in respect of which a non-resident person or a corporation incorporated overseas was entitled to control the exercise of at least 15 percent of the voting stock or in respect of which two or more such persons or such corporations were entitled to control the exercise of at least 40 percent of the voting stock.[190]

In less formal language, any firm in which a single nonresident owns more than 15 percent of the voting stock or where aggregate nonresident holdings exceed 40 percent of the voting stock is deemed to be a foreign interest. If such a foreign interest in turn acquires more than 15 percent of the voting stock of an Australian-owned entity, or where its share acquisition leads more than 40 percent of the target firm's stock being owned, in total, by foreign interests, then control is normally deemed to have passed to foreign interests. The takeover is now subject to review, and in order to be allowed to proceed, the Treasurer must deem the takeover to be 'not contrary to the national interest'. The meaning of 'national interest' was not defined in the CFT Act: instead, a number of criteria to be used by the Treasurer in making a decision were subsequently spelled out in a policy speech to which I now turn.

National Interest Test

In his speech of 26 September 1972, Prime Minister McMahon provided a set of guidelines to be used in administering the national interest test:

> The first criterion to be applied in judging whether a proposed foreign takeover would be against the national interest will be: Whether, against the background of existing circumstances in the industry concerned, the takeover would lead, either directly or indirectly, to net economic benefits in relation to such matters as production, prices, quality and range of products and services, and efficiency and technological change which would be sufficient to justify the increased degree of foreign control of the particular industry that would result from the takeover.
>
> If the proposed takeover is judged to be not against the national interest on this basis, the following additional criteria will also be taken into account: Whether, after the takeover, the firm is concerned with Australia's interest in matters such as exports, imports, local processing of materials produced, research and development and industrial relations, including employee protection or regional development.[191]

It should be noted that the guidelines are not included in legislation but, as we shall see later, this does not reduce their significance given the Commonwealth's constitutional power over foreign exchange and exports.[192] Finally, the reader should be alerted to the fact that the McMahon guidelines represent the roots of the existing structure.

Administrative Factors

Under the act, the Treasurer was given up to 90 days to issue an order to stop the takeover; if none was given, the investment proposal was implicitly accepted by the government.[193] Despite an earlier promise, the McMahon government failed to set up an independent review body; instead, they set up an interdepartmental committee, the Committee on Foreign Takeovers (COFT), to advise the Treasurer. In practice, the Treasury itself exercised most of the decision-making power since it was their staff which undertook the detailed investigations and their representative on the COFT obviously had the ear of the Minister.

The operating experience of the COFT has been discussed by Sexton and Adamovich:

> In the period from December 1972 to August 1974, notification was given under the legislation of more than 450 takeover proposals, of which approximately three-quarters were disregarded after a preliminary examination as being unobjectionable or not subject to the provisions of the statute, and one-quarter ordered to receive a more detailed examination. Of that 25 percent, 11 proposals (approximately 2 1/2 percent of the total notified) were objected to as being contrary to the national interest, and 39 were found to raise no objections or to fall outside of the Act. It appears, however, that 20 of the proposals referred for detailed examination were withdrawn before any decision was reached.[194]

The Whitlam Years: 1973-75

The 5 December 1972 federal election brought to power the Australian Labour Party (ALP), under the leadership of Gough Whitlam. During the following three years the foreign direct investment debate raged, and by 1975 much of the current regulatory regime was in place. It is of particular interest to note that the mineral sector served as the focal point of much of the controversy.

OPEN WARFARE: 1973

During 1973 a number of events took place on the FDI front which were to have lasting impact. Over the course of the year, restrictions on foreign investments in several areas were announced: real estate; nonbank financial institutions; insurance companies; and energy minerals.

The latter sector was the subject of a 29 October 1973 speech by Prime Minister Whitlam, to the Australia-Japan Ministerial Committee. He used this opportunity to make a number of rather revolutionary statements:

> We believe that overseas capital must continue to play a significant role, in partnership with Australian capital, in our future economic growth . . . Howev-

> er, in some special energy cases, which I shall mention shortly, we do have a particular objective of 100 percent Australian ownership ... Uranium is one of these energy sources and we have an objective of full Australian ownership in development projects involving uranium. We also regard this as a desirable objective in oil, natural gas and black coal.[195]

Mr. Whitlam went on to add:

> Thus, while we seek to require equity in new projects involving these four minerals to be in Australian hands, we do look for overseas participation in some way: through access to technology, loans and especially long-term contracts ... For other minerals our approach is more flexible. We desire partnership between Australian and foreign equity capital.[196]

Needless to say, the business community was shocked by these policies. However, more was yet to come:

> It is not our aim to have a different set of criteria for overseas participation in mineral exploration from those for participation in the development of proved mineral deposits ... In the uranium field in particular, and desirably also in oil, we aim to adopt the same sort of approach in exploration as I have already outlined for development of these minerals. However, in order to maintain a desirable level of exploration activity, we would, if necessary, accept a lower level of Australian ownership in exploration.[197]

In summary, in his 29 October 1973 speech, Prime Minister Whitlam dramatically changed the rules of the game for FDI in the mineral sector, at both the development and exploration stages. It is for this reason that an excessive amount of quoting has been employed; indeed, some would suggest that from this point on the Whitlam government's mineral policy, as it pertains to FDI, was in disarray and marked by constant retreat. Although later policies were much more moderate, it is for the Tokyo speech that the business and financial community largely recall Whitlam's FDI policy for the mineral sector.

By the end of 1973 the new government had, in effect, established the mining, insurance and near bank financial institutions as key areas. To this list must be added a number of others that had evolved over the years: radio and television; newspapers; civil aviation; and banking.[198]

EXTENDING THE SCREEN: 1974

Throughout 1974 the FDI regulatory system was both broadened in scope and refined from an administrative perspective. On 12 June 1974 the Prime Minister announced that the screening process would be expanded, from takeovers only, to include all new foreign investment proposals for which foreign exchange approval was required. In order to assist the Treasurer in making the required assessments, a new committee, the Foreign Investment Committee (FIC), was formed; it consisted of members from the same departments represented on the Committee on Foreign Takeovers (COFT) and was to perform essentially the same function as the COFT. At this time, it was announced that the FIC had been asked to explore ways of extending the screening process to all new foreign investment proposals; this, of course was aimed at those initiatives funded out of retained earnings and borrowing on the domestic market.[199]

In the latter part of 1974, two major announcements were made that had an additional impact on FID on the mineral sector. First, Mr. Connor, the strident economic nationalist who was then Minister of Minerals and Energy, revealed the government's new uranium policy on 31 October.[200] It consisted, in part, of a compulsory joint venture scheme whereby the Atomic Energy Commission was expected to participate in new uranium mining activities in the Northern Territory (then the major location of prospective uranium orebodies); this clearly had a retroactive impact on a number of foreign firms that had found rich orebodies in the territory. Second, exploration activity in the area was to be the sole reserve of the Atomic Energy Commission and the Bureau of Mineral Resources. Although both of these actions clearly affected foreign interests, these concerns were swamped by rather vehement protests from domestic miners.

A few days later, on 3 November 1974, Mr. Whitlam outlined the government's 'Guidelines for Foreign Equity Participation in and Control of the Mining Industry'.[201] Although somewhat conciliatory in tone, the guidelines did little to address the mining industry's basic concerns: the absence of clarity and precision in the rules; and the lack of stability in the policy framework within which the industry was expected to operate.

The guidelines amounted to a partial retreat from the policies enunciated in Mr. Whitlam's Toyko speech of 29 October 1973. This was achieved by shifting the more strident Australian ownership objectives to the long term:

> The government's basic aim is to ensure that Australia's mineral resources are developed in such a way as to bring maximum benefits to the Australian people. If this objective is to be achieved, ultimate responsibility for the exploration, development and processing of minerals must rest with Australians . . .
>
> The Government desires, as a major objective, to promote Australian equity in and control of its resources and industries, and maximum Australian ownership compatible with Australia's long-term capital requirements and its need for access to markets, advanced technology and know-how. The Government recognizes however, that many of the important existing enterprises engaged in

> the development of Australian resources are under foreign equity control. For this reason, the promotion of Australian equity in and control of our resources and industries must be viewed as a longer-term objective.[202]

A similar retreat was made at the exploration stage. As might be imagined, the lack of specificity in the statements did little to appease either the domestic or foreign mineral interests.

Let us return to the broader policy setting for a moment. On 10 December 1974, the Treasurer announced that the government was drafting new takeover legislation.[203] From the perspective of this study, the two most notable changes were: mineral rights were to be included as an asset whose acquisition was to be subject to review;[204] and transfers of control between foreign interests were now to be treated in the same way as transfer of control from Australians to foreigners.

PERIOD OF RECONCILIATION

Throughout 1975, further modifications were made to both the mineral and overall FDI regulatory policies. However, the changes made were of a different nature than those of the preceding year: now the rules and definitions were given a greater degree of precision, and a comprehensive overall framework was developed.

The first such policy directive was delivered by Prime Minister Whitlam on 12 March 1975. In addition to reiterating the then current policies towards the mineral sector, he indicated that 'foreign companies involved in exploration for oil in Australia were not required to seek Australian participation up to the detailed proving up stage. However, Australian participation was required for any development past this stage'.[205] Although industry commentators were pleased with the tone of the announcement, there was concern over the meaning of the term 'detailed proving up stage'. Nevertheless, refinements were at last being made.

After three years of controversy and continuous adjustment and refinement, the Whitlam government on 24 September 1975 was ready to reveal its comprehensive 'Foreign Investment Policy'.[206] Before discussing the mineral-specific aspects, let us focus on the administrative and broad policy issues.

In introducing the new policy, Mr. Whitlam tried to assure foreign investors that they were welcome:

> I emphasize that the Government recognizes that Australia will, for the foreseeable future, continue to require foreign capital, including equity capital, if we are to achieve our basic aim of ensuring that Australia's resources and industries are developed in such a way as to bring maximum benefits to the Australian people. Within this over-riding goal, however, the Government,

> while continuing to welcome beneficial foreign capital, has a major longer-term objective of the promotion of Australian control and the maximum Australian ownership compatible with our long-term capital investments and our need for access to markets, advanced technology, and know how.[207]

However, it is unlikely that the foreign investment community was placated by such a begrudging acceptance of their role in the development process.

Screening Process

Perhaps the most important administrative feature of the new policy was the establishment of a new committee, the Foreign Investment Advisory Committee (FIAC), which was to replace both the Foreign Investment Committee and the Committee on Foreign Takeovers. The new entity was to advise the Treasurer on foreign investment proposals with respect to takeovers and new business activities including those not requiring foreign exchange controls. As in the case of the disbanded committees, the FIAC comprised representatives from Treasury, the Attorney-General's Department, the Department of Minerals and Energy, the Department of Overseas Trade, the Department of the Prime Minister and Cabinet, the Department of Manufacturing Industry, and the Reserve Bank.

The FIAC was to be given a maximum of 90 days in which to consider foreign investment proposals reviewable under the guidelines (to be discussed below) and 120 days for takeover proposals. The latter was specified in the new Foreign Take-Over Act 1975 which was passed by Parliament on 21 August 1975 and enacted on 1 January 1976. Since it is still in effect, discussion of it will be deferred to the following chapter.

Proposals Subject to Review

In all cases, a necessary condition for an investment proposal to be subject to review was the presence of a foreign interest which is defined as:

> foreign interests: for the purposes of the screening process are corporations in which a single foreign shareholder, or associated foreign shareholders, own 15 percent or more of the equity of the corporation, or in which the total foreign equity exceeds 40 percent.[208]

This definition is more commonly known as the '15/40 rule'. In terms of takeovers, control is deemed to pass if a single foreign interest acquires 15 percent of the voting shares or if, in aggregate, foreign interests acquire 40 percent of the voting shares. If this occurs, the takeover is reviewable. In general, such takeovers are allowed to proceed if the proposal is found to be 'not contrary to the national interest'.

All other investments by foreign interests are potentially reviewable if they involve the setting up of new businesses or the expansion of existing businesses into a new primary activity as defined by reference to the Australian Standard Industrial Classification System.

In addition, with minor exceptions, the FIAC was also expected to screen expansions by foreign interests already in operation where:

> The cost of the expansion in any 12 months amounts to more than 15 percent of the company's total assets before the proposal expansion, provided that any expansion involving more than $10 million in any 12 months will be screened and further provided that *all proposed expansions in mining* and real estate *will be screened.*[209]

After having spread the net extremely widely, it was stated that except for proposals in certain special areas (non-bank financial institutions, new insurance companies, minerals and real estate) foreign initiatives for which less than $1 million will be spent in any 12-month period would not be reviewed by the FIAC. In addition, it was stated that if it could be shown that the investment project was subject to Australian control it would generally be approved; once again, the special areas were excluded from this provision.

SPECIAL AREAS

As implied above, the Whitlam government identified near-bank financial institutions, new insurance companies, real estate and mineral activities as special areas. These were in addition to the longstanding legislative restrictions in the areas of banking, broadcasting and television, newspapers, and civil aviation. For purposes of this study I shall restrict my analysis to the mineral sector.[210]

The reader will recall that, despite the Prime Minister's attempt to clarify his government's foreign investment policy in the mineral sector on 3 November 1974, much ambiguity remained. Mr. Whitlam now admitted as much:

> Despite these statements, it appears from various communications the Government has received that there is still uncertainty among foreign mining companies as to some of the details of the Government's policy on foreign equity participation in the mining industry in the future. The purpose of today's statement is to outline the Government's policy in detail in order to resolve these uncertainties.[211]

In many ways the new initiatives did provide a relatively certain framework for decision making. Unfortunately, business/government relations had deteriorated to the point where it became unlikely that the major improvements to the process actually helped stimulate foreign investment. Nevertheless, the new mineral sector rules are of significance since they continue to serve as the cornerstone of the present regulatory system.

The exploration stage was now largely removed from scrutiny, although 'the government wishes to see a significant degree of Australian involvement in mineral exploration; including participation with foreign exploration companies'.[212] Foreign companies were, however, required to notify the FIAC of their exploration programs and, at least every two years, of their efforts to attract Australian equity. In addition, the government clearly stated that, before a commercial mineral discovery from such exploration activity could be developed, the project would have to adhere to the guidelines pertaining to mineral sector activities as discussed below.

Mineral Development Stage: Guidelines

The mineral-specific guidelines consisted of two parts: those applying to uranium, and those applying to other minerals.

URANIUM

All new uranium mines associated with discoveries made on exploration licenses granted after 24 Septemer 1975 were to be 100 percent Australian owned. However, for new mines associated with past discoveries or future discoveries on currently held mineral leases, the degree of Australian participation was to be the subject of negotiation.

OTHER MINERALS

All new mineral projects were to be no more than 50 percent foreign owned and foreign participants were to comprise no more than 50 percent of the votes on the board of directors of the developing corporation. In addition to satisfying the sector-specific criteria, foreign investments in the mineral area were to be subject to the general guidelines: that is, they were still expected to be 'not contrary to the national interest' as determined with reference to the general guidelines. Let us now refer briefly to the overall criteria.

General Criteria for Assessment of Foreign Investment Proposals

As a preamble to the guidelines, the government presented its foreign investment policy objectives as:

> To ensure that foreign investment proposals are associated with productive investment which adds to Australia's real resources and brings benefits to the nation; and whilst continuing to welcome beneficial foreign capital, to promote, in the longer term Australian control – and maximum, practicable Australian ownership – of its industries and resources.[213]

More specifically, the FIAC was asked to consider the following criteria when advising the Treasurer whether or not foreign investment proposals deemed to be subject to review are contrary to the national interest:

> *Ownership and Control*
>
> In the light of the Government's objectives with regard to Australian control and ownership, the Committee will take into account: the extent of Australian control (including management) and ownership in a project; and the extent to which the participants have sought Australian equity participation from either the private or the public sector.
>
> *Net Economic Benefits*
>
> The Committee will take into account whether, against the background of existing circumstances in the industry concerned, the proposal will lead, either directly or indirectly, to net economic benefits in relation to such matters as: a broadening of Australia's industry base; competition, level of prices and efficiency; productive capacity; introduction of new technology, managerial skills and other know-how; development of new markets; production; quality and range of products and services; employment, including numbers and staff training.
>
> *Additional Criteria*
>
> In assessing a proposal the following additional criteria will also be taken into account: whether the new venture could be expected to follow commercial practices consistent with Australia's interest in matters such as: exports; local processing of materials produced; research and development; industrial relations; financial arrangements, including taxation; royalty and licencing arrangements; the interests of shareholders, insurance policy holders, and claim holders generally, as appropriate; and whether the proposal would be consistent with Australia's international obligations and with the Government's objectives, for, *inter alia*: environment; urban and regional development; aboriginal land rights; maximum practicable Australian ownership of real estate; defence.[214]

Guidelines: Concluding Comments

Unfortunately for the ALP, the Whitlam government was never able to reap the benefits from the above described initiatives. On 5 December 1975 the ALP lost power to the Liberal/National Country Party coalition forces under the leadership of Malcolm Fraser. The new government in developing its foreign investment policy drew heavily upon the 24 September 1975 proposals of Gough Whitlam. Equally interesting is the fact that the national interest criteria, as presented above, are quite similar to the set promulgated earlier by then Prime Minister McMahon.

Summary

In this chapter I have tried to trace the nature of the foreign direct investment debate in Australia; in particular, I have focused on those aspects relating to the mineral sector that served as antecedents of the current control system.

I shall now move to my primary objective, the presentation and assessment of the present-day Australian regulatory system of foreign direct investment with emphasis on the impact of such policies on the nonpetroleum mineral sector.

5. A Description of the Australian System of Foreign Direct Investment Controls

Introduction

Although the Liberal and National Country parties (Lib/NCP) complained vociferously throughout 1974-75 that Labor's foreign direct investment controls were stifling economic activity, particularly mineral related ventures, their election platform for the 1975 federal election did not differ significantly from that of the ALP.[215] Undoubtedly this was in large part due to the fact that by September 1975 the Whitlam government had taken major steps to remove or modify the more contentious parts of its policy towards foreign investors. In addition, it was obvious to all political observers that the post-1973 oil crisis had increased foreign interest in Australia's energy resources. This was particularly true of international oil companies.

Barnett,[216] in his comprehensive study of Australia's mineral and energy policies, clearly outlines the nature of the problem. As shown previously in table 9, most of the increase in the level of foreign ownership in the mineral industry during the 1972-75 period was in the mineral fuel sector. Further analysis reveals that the black coal sector was the primary target of foreign investors: as illustrated in table 10, the level of foreign ownership in this sector increased from 33 percent in 1971-72 to 62 percent in 1974-75.[217] This information left the new Fraser government with little choice but to continue to regulate the entry of FDI.

The extent of the political problem can be viewed from an alternative perspective: the degree of foreign control over the mineral industry. As shown in table 11, the level of foreign domination is even greater under this measurement concept; for example, by 1975 over 60 percent of all mining ventures were foreign controlled. The corresponding figure for the fuel mineral sector was a rather startling 75 percent, triple its level of ten years earlier.

These data led to widespread public concern, since many Australians apparently believed that foreign firms should not be given unrestricted access to the country's nonrenewable resources, for two ma-

TABLE 11

Foreign Control[a] *of the Australian Mining Industry, 1963-75 (Percent)*

Year	Metallic Minerals	Fuel Minerals	Other Minerals	All Mining
1963	53.6	15.5	19.2	36.8
1964	52.8	18.4	19.7	39.1
1965	57.7	25.5	25.1	44.6
1966	62.1	28.7	27.5	49.8
1967	64.9	32.5	28.5	52.9
1968	68.8	39.7	28.6	58.1
1971/2	52.8	68.2	5.3	55.0
1972/3	54.2	71.4	9.5	57.7
1974/5	56.4	74.5	12.6	60.2

Source: Donald W. Barnett, *Minerals and Energy in Australia* (Sydney: Cassell Australia, 1979), p. 234.

[a] The Australian Bureau of Stastistics definition of control is utilized: an operation is considered to be entirely under foreign control if the foreign direct ownership exceeds 50 percent, or if direct ownership by a foreign entity exceeds 25 percent and there is no Australian parent company holding a greater equity interest in the venture.

jor reasons. First, the benefits from such developments should largely accrue to Australians; and second, foreign firms might be less responsive to such factors as Aboriginal rights and environmental protection. In summary, it was 'good politics' to listen to the pleas of the economic nationalists while at the same time being cognizant of the need for economic growth. After its election victory, the Fraser government faced the problem of trying to determine, in a pragmatic manner, the relative weights to be given to these competing objectives.

The approach finally adopted, as reflected in the Treasurer's statement of 1 April 1976,[218] was to try to introduce greater flexibility into the September 1975 Whitlam policy guidelines while keeping the basic tenants of the prior scheme. In particular, great emphasis was placed on the 'cosmetics' of the framework: for example, thereafter, the virtues of FDI were extolled in virtually all ministerial pronouncements on the subject. Neverthless, in a subtle fashion, it was also suggested that Australians must participate in a fair and equitable manner in the development of their natural resources; that is, certain rules and regulations must unfortunately be attached to FDI.

In a more general sense, the Fraser government promulgated its foreign investment guidelines, which in reality were not significantly different from the Septemer 1975 ALP version, in a highly sophisticated manner. To the foreign investor, they were sold as the minimum constraint set necessary to ensure that FDI would remain essentially a bipartisan policy. In other words, these rules were sold as a necessary price to be paid in order to ensure that the Lib/NCP coalition would remain in power.[219] The same set of rules were then used internally to demonstrate that the government's policies have fostered local participation and control: for instance, from 1979 to 1982, all new mineral projects in Australia exhibited at least 50 percent local equity ownership.[220]

The Foreign Direct Investment Regulatory System: 1976-82 Version

The FDI regulatory system in place as at February 1983 is based upon five major policy documents: the Foreign Takeovers Act 1975; and four Ministerial Statements issued on 1 April 1976,[221] 8 June 1978,[222] 10 June 1979,[223] and 20 January 1982 respectively.[224] In presenting the present system[225] in a non-legalistic manner, I shall rely heavily upon the Treasury's guidebook for foreign investors, *Australia's Foreign Investment Policy: A Guide for Investors*[226] and on the work of Sexton and Adamovich.[227] As stated above, no claim of originality is made by the author to the contents of this section; instead, it consists of a presentation, often in the exact words of the Treasury, of the scheme that must be faced by firms now contemplating direct investments in the Australian mineral sector.

On 1 April 1976 the Treasurer outlined the basic framework of the Fraser government's approach toward foreign direct investment. Proposals to take over existing Australian business would continue to be subject to the Foreign Takeovers Act 1975, while new business activities, broadly defined, were to be subject to a new set of guidelines. Before presenting the applicable rules and regulations, it may be of interest to comment on the form, as opposed to the substance, of the Fraser government's initiatives.

In his 1 April 1976 statement, the Treasurer went out of his way to reassure foreign investors that the Fraser government was sympathetic to their past complaints of maltreatment. For instance:

> The statement I am making is necessary in order to dispel the atmosphere of confusion and uncertainty in which foreign investors have had to operate over the last few years ... This confusion arose because the previous Government was very conscious of the costs of foreign investment but was reluctant to adequately acknowledge its benefits.[228]

Immediately thereafter, Mr. Lynch laid out the cornerstone of the present government's policy:

> Let me be clear at the outset. The Government's basic objectives are to encourage foreign investment in Australia because of the considerable contribution it can make to Australian development and prosperity but, at the same time, to see that such investment is on a basis of fair sharing of net benefits as between the foreign investor and the needs and aspirations of the Australian community.
>
> Our policy will offer Australians maximum opportunity to participate as fully and effectively as practicable in the ownership and control of our natural resources and industries – and, thereby, in decisions having an important influence on our economic and social development. What it will offer foreign investors is fair treatment under clear guidelines in the belief that we will thereby be making a significant move towards getting Australia going again.[229]

It is apparent that the then Lib/NCP coalition government intended to straddle both sides of the street: a hospitable environment for FDI within clearly defined limits.

The Foreign Investment Review Board

The Treasurer also indicated in his 1 April 1976 pronouncement that a new body, the Foreign Investment Review Board (FIRB) would replace the existing advisory group, the Foreign Investment Advisory Committee (FIAC).

According to Mr. Lynch, the functions of FIRB were to be:

i to advise the government on foreign investment matters generally;
ii to foster an awareness and understanding of the government's policy in the community at large and in the private enterprise sector in particular;
iii to give guidance to foreign investors on those aspects of their proposals that may not be in conformity with policy and suggest ways by which such proposals might be amended;
iv to work towards a high level of Australian participation in new investment undertakings;
i to establish liaison with state government authorities;
vi to keep in touch with the activities of foreign-controlled businesses operating in Australia.[230]

Note the public relations role given to FIRB under ii, iii and v. On the other hand, the monitoring function given by point vi would be regarded by many Canadian observers as rather controversial.[231]

FIRB differed in many ways from its predecessor, FIAC. First, and most important, it was not an interdepartmental committee; it was, instead, a board of 3 people,[232] two of whom were to be part-time private citizens, usually retired business executives. The third, the Executive Member, was to be the head of the board's secretariat, the Foreign Investment Division (FID) of the Treasury; it is this latter group, FID, that most closely resembles FIRA.

The concept for a quasi-independent board was undoubtedly adopted, in part, to increase investor confidence.[233] The government hoped that by placing senior ex-businessmen in advisory positions, it would lead investors to the conclusion that matters of commerce, as well as politics and public administration, entered into the decision calculus.

Proposals Subject to FIRB Review

According to the Treasury's publication, *Australia's Foreign Investment Policy*, the board examines certain types of investments by foreign interests. It should be noted that the term 'foreign interest' is defined as:[234]

i a natural person not ordinarily resident in Australia;
ii a foreign-controlled corporation or business; or
iii any corporation or business in which there is a substantial foreign interest regardless of whether the corporation or business is foreign controlled. (A substantial foreign interest is defined as an interest of 15 percent or more in the ownership or voting power of a corporation or business by a single foreign interest either alone or together with associates; or an interest of 40 percent or more in aggregate in the ownership or voting power of a corporation or business by two or more foreign interests and their associates, if any.)

Foreign Takeovers

In general, investments by foreign interests in existing Australian businesses are subject to review if the corporation will, after the transaction, be foreign controlled; this applies regardless of the control status of the target firm prior to the proposed share (or asset) acquisition by foreign interests. That is, a proposed investment in a firm that is already deemed to be subject to foreign control will still be subject to review if such control is transferred to another foreign interest or if an existing foreign interest attempts to increase its level of control. Foreign control is deemed to exist if:

i a natural person not ordinarily a resident of Australia or a corporation incorporated outside Australia, either alone or together with associates, holds an interest of 15 percent or more in the ownership or voting power of the corporation concerned; or

ii two or more persons, being natural persons not ordinarily residents of Australia or corporations incorporated outside Australia, have aggregate interests of 40 percent or more in the ownership or voting power of the corporation concerned.[235]

However, if the proponent can demonstrate to the Treasurer that, notwithstanding the above, it will not be in a position to determine the policy of the target enterprise, then the Treasurer may deem the proposal to be outside the scope of the FTO Act.

Hence, an investment proposal by a foreign interest (as previously defined) that results in that entity acquiring at least 15 percent of the target firms' voting shares or that would increase a share holding beyond the 15-percent level is subject to review. In addition, a share (or asset) purchase by a foreign interest that increases the total foreign holding in the target firm beyond 40 percent of the voting or issued shares is also subject to review.

If the Treasurer deems foreign control actually to exist, then a proposal will be allowed to proceed only if it is 'not contrary to the national interest'. The criteria to be employed in making this decision are identical to those utilized in the assessment of new business proposals; hence the presentation of the decision criteria will be delayed until this category of investment has been discussed.

Before leaving the foreign takeover area, it should be noted that takeovers of firms with assets valued at less than $A2 million are normally exempt from review.[236] This pragmatic exemption, however, does not pertain to investments in prohibited, restricted or special areas such as the mineral sector.

New Business Investment Proposals

Investment proposals not coming under the Foreign Takeovers Act but falling within the following categories are subject to review:[237]

i proposals to establish a new business or project, irrespective of size, in sectors subject to special restrictions; namely, finance, insurance, the media, civil aviation, uranium and activities relating to uranium;

ii proposals to establish new businesses in other sectors of the economy where the total amount of the investment is $5 million or more. For the purposes of this guideline, total investment means the total expenditure expected to be associated with the proposal, including the value of any assets leased;

iii direct investments by foreign governments or their agencies (that is, excluding portfolio investments or investments related to their official representation);

iv certain proposals to acquire real estate and real estate development projects.

In contrast to proposals under the Foreign Takeovers Act which are covered by legislation, the above proposals are subject to voluntary compliance. However, this is largely an illusion since the government has indicated that it will not hesitate to use the its powers over foreign exchange and export controls to encourage such compliance.[238] It is obvious that, for mineral projects in particular, these are strong powers; therefore, as one might expect, the government has not encountered any difficulty in receiving the necessary cooperation in its efforts to enforce the guidelines.

In order to interpret the above rules, a comment is in order. A new business is deemed to have been established if an existing foreign-owned firm diversifies into an activity not previously undertaken in Australia. In recent years, the Treasury publications have not contained a definition of the term, but the 1976 Ministerial Statement stated:[239]

> A new business (which includes the diversification of an existing business) is defined with reference to the Australian Standard Industrial classification as published from time to time by the Australian Statistician. A proposal will be taken to involve an establishment of a new business if it will result in a foreign interest carrying on a new primary activity outside that ASIC group in which the foreign interest is already engaged in Australia. *A new business also includes a new natural resource project.*

A comparison of the Whitlam and Fraser guidelines suggests that the schemes are largely identical with respect to the types of proposals subject to review. The only major difference is that the Fraser regime did not review expansions of existing businesses (note above definition of a new business).

Examination of Proposals

All proposals are required to be 'not contrary to the national interest' if they are to be approved by the Treasurer. In making this judgement, reference is to be made to a set of criteria; according to the Treasury they are:[240]

(a) whether, against the background of existing circumstances in the relevant industry, the proposal would produce, either directly or indirectly, net economic benefits to Australia in relation to the following matters:

i competition, price levels and efficiency;
ii introduction to technology or managerial or work-force skills new to Australia;
iii improvement in the industrial or commerical structure of the economy, or in the quality and variety of goods and services available in Australia;
iv development of or access to new export markets.

If a proposal is judged to be not contrary to the national interest on the basis of the above criteria, the following additional criteria are taken into account:

(b) whether the business or project concerned could be expected to be conducted in a manner consistent with Australia's best interests in matters such as:

i local processing of materials and the utilisation of Australian components and services;
ii involvement of Australians on policy-making boards of businesses;
iii research and development;
iv royalty, licensing and patent arrangements;
v industrial relations and employment opportunities.

(c) whether the proposal would be in conformity with other government economic and industrial policies and with the board objectives of national policies concerned with such matters as Australia's defence and security, Aboriginal interests, decentralisation and the environment, as well as with Australia's obligations under international treaties;

(d) the extent to which Australian equity participation has been sought and the level of Australian management and control following implementation of the proposal;

(e) taxation considerations, including the manner in which the proposal is to be financed;

(f) the interests of Australian shareholders, employees, creditors, and policyholders affected by the proposal.

All of the criteria are not necessarily relevant to each proposal. The list is drawn on to the extent appropriate in the circumstances of a particular case. In the examination process a liberal approach is taken towards proposals that are accepted as being Australian controlled upon implementation. Except for investment in the natural resources area, in real estate, banking, insurance, financial intermediaries, the media, and civil aviation, such proposals are approved unless there are special circumstances.

Where proposals concern areas of the economy in which foreign ownership and control is already extensive, or would become extensive as a result of the implementation of the proposal, the Government expects to see significant ecoiii direct investments by foreign governments or their agencies (that is, excluding portfolio investments or investments related to their official representation);

iv certain proposals to acquire real estate and real estate development projects.

In contrast to proposals under the Foreign Takeovers Act which are covered by legislation, the above proposals are subject to voluntary compliance. However, this is largely an illusion since the government has indicated that it will not hesitate to use the its powers over foreign exchange and export controls to encourage such compliance.[238] It is obvious that, for mineral projects in particular, these are strong powers; therefore, as one might expect, the government has not encountered any difficulty in receiving the necessary cooperation in its efforts to enforce the guidelines.

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- ii introduction to technology or managerial or work-force skills new to Australia;
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If a proposal is judged to be not contrary to the national interest on the basis of the above criteria, the following additional criteria are taken into account:

(b) whether the business or project concerned could be expected to be conducted in a manner consistent with Australia's best interests in matters such as:

- i local processing of materials and the utilisation of Australian components and services;
- ii involvement of Australians on policy-making boards of businesses;
- iii research and development;
- iv royalty, licensing and patent arrangements;
- v industrial relations and employment opportunities.

(c) whether the proposal would be in conformity with other government economic and industrial policies and with the board objectives of national policies concerned with such matters as Australia's defence and security, Aboriginal interests, decentralisation and the environment, as well as with Australia's obligations under international treaties;

(d) the extent to which Australian equity participation has been sought and the level of Australian management and control following implementation of the proposal;

(e) taxation considerations, including the manner in which the proposal is to be financed;

(f) the interests of Australian shareholders, employees, creditors, and policyholders affected by the proposal.

All of the criteria are not necessarily relevant to each proposal. The list is drawn on to the extent appropriate in the circumstances of a particular case. In the examination process a liberal approach is taken towards proposals that are accepted as being Australian controlled upon implementation. Except for investment in the natural resources area, in real estate, banking, insurance, financial intermediaries, the media, and civil aviation, such proposals are approved unless there are special circumstances.

Where proposals concern areas of the economy in which foreign ownership and control is already extensive, or would become extensive as a result of the implementation of the proposal, the Government expects to see significant economic benefits and/or significant Australian equity participation before approval is granted.

Once again, the criteria employed by the Fraser government were quite similar to those enunciated by then Prime Minister Whitlam on 24 September 1975. Perhaps the most important difference was the inclusion of the following criteria: '... and the utilization of Australian components and sources'.[241] Therefore, in terms of the general examination criteria, the Fraser government did not relax the national interest test; in fact, its potential severity may have been increased.

Special and Restricted Areas

As noted previously, the areas of banking, broadcasting and television, and civil aviation have been restricted to foreign direct investors by special legislation; these restrictions have evolved since 1945 and essentially represent *ad hoc* reactions to politically sensitive events.[242] However, as initiated during the Whitlam years, the Fraser government carried on the system of identifying 'key areas' of the economy wherein, due to national interest considerations, sector specific controls were to apply. In all such cases, investment proposals within a designated 'key area' were expected to pass both the sector-specific test and the 'not contrary to the national interest' criteria. The sectors designated for a more zealous scrutiny were: non-bank financial intermediaries; insurance companies; newspapers; real estate; uranium; mining (other than uranium); agriculture, pastoral; fishing and forestry. The last five items are subsumed under the natural resources label.

Given the scope of this study, I shall focus only on the uranium and mining sectors. Let us address each in turn.

Uranium Mining

According to the 1 April 1976 Ministerial Statement, uranium mining was to be treated as follows:[243]

> Because of its unique status, special conditions will apply to foreign investment in uranium. In this sector a project involving investment by foreign interests, not already in production, will only be allowed to proceed provided it has a minimum of 75 percent Australian equity and is Australian controlled. This is to be achieved by the time the project comes into production. In this area regard will be paid to foreign portfolio investment.
>
> Uranium enrichment, and other investments in the nuclear fuel cycle apart from mining and production to the yellowcake stage, are not covered by this rule and will be looked at separately.

It is interesting to note that these rules are somewhat different from those proposed by the 24 September 1975 Whitlam guidelines. Although the Fraser criteria suggest that only 75 percent Australian equity is required, as opposed to 100 percent under the Whitlam rules,[244] the net is considerably different. In the former case, the 75-percent ruling applied to all mines constructed after 1 April 1976; in contrast, the Whitlam rules required 100 percent Australian ownership only of those mines using orebodies discovered on leases issued after 24 September 1975. All developments associated with orebodies found prior to that date and all discoveries associated with mineral leases held at that date, were exempt from the 100-percent ruling. Instead, the appropriate ratio was to be determined by negotiations. Without knowledge of the settlements that might have been reached under the Whitlam regime, it is impossible to assert whether or not the later version represents a relaxation or a tightening up of the rules.

On 10 June 1979 the Treasurer, Mr. Howard, announced a relaxation of the rules,[245] the rationale for which will be discussed in the next chapter. At this point, it should suffice to state that the new system increased the amount of discretion available to the government and at the same time provided FIRB with a stronger mandate within which to monitor nonequity control arrangements. The current rules for the uranium sector are:[246]

> A proposed project for the mining and production of uranium should have a minimum of 75 percent Australian equity and it should be Australian controlled. Only in cases where 75 percent Australian equity is clearly unobtainable, will alternative proposals be considered. In such cases, it would need to be demonstrated satisfactorily that:
>
> i 75 percent Australian equity is unavailable;
> ii the project would be of *significant economic benefit* to Australia;
> iii there would be at least 50 percent Australian equity;
> vi Australian participants would have the major role in determining the policy of the project.
>
> Where projects do not have 75 percent Australian equity and Australian control, arrangements may be required to increase Australian participation over an agreed period.
>
> In determining whether a project complies with the Government's equity and control guidelines, the following factors will be taken into account:
>
> i the level of foreign portfolio holdings in Australian companies participating in a project; however, in the absence of special circumstances, individual portfolio shareholdings of less than 10 percent will be disregarded; regarded;

> ii the extent and nature of financing prepayment arrangements, participating interests, profit sharing arrangements and other arrangements not necessarily associated with legal ownership of the assets of a project but which confer on the participant the right to receive benefits from a project, and management arrangements affecting control of the project.

Mining Sector

Nonuranium mining projects are subject to the '50/50' rule. Before presenting the criteria, I must stress that they also apply to agricultural, pastoral, fishing and forestry operations; in aggregate, these industries constitute the natural resource sector for which the following policy framework applies:[247]

> A proposal for a new mining business or project involving total investment of $5 million or more which is not contrary to the national interest will, as a general rule, only be allowed to proceed if it has a minimum 50 percent Australian equity together with at least 50 percent of the voting strength on the board or controlling body held by Australian interests.
>
> A proposal which does not meet these guidelines may still be allowed to proceed if it is not otherwise contrary to the national interest and if the Government judges that the unavailability of sufficient Australian equity capital on reasonable terms and conditions would unduly delay the development of Australia's natural resources. In that event, however, the Government will, as appropriate, seek satisfactory arrangements for the guidelines to be met within an agreed period.
>
> In determining whether a project in the minerals sector complies with the guidelines, the level of foreign portfolio shareholdings in Australian companies participating in the project is not taken into account. However, certain other factors may have a bearing on the level of foreign ownership and control. These include the extent and nature of financing and prepayment arrangements, participating interests, profit sharing, marketing and other arrangements not necessarily associated with the legal ownership of the assets of a project but which confer on the participant the right to receive benefits from a project, and management arrangements affecting control of the project.

The reader will note that these rules appear to be much more flexible than those promulgated by Mr. Whitlam in his 24 September 1975 speech. At that time, he stated that all new mining projects must be at least 50 percent Australian owned and that a minimum of 50 percent of the votes on the Board of Directors must be controlled by Australians; the guidelines permitted no exceptions.[248] Nevertheless, we shall see in the next chapter that the Fraser regime allowed very few exceptions and hence the apparent flexibility was, once again, essentially a 'cosmetic' exercise.

Mineral Exploration

The official position of the Fraser government on foreign participation in mineral exploration activities was virtually identical to that inherited from their predecessors:[249,250]

> Foreign interests are not obliged to seek Australian participation in their mineral exploration activities. However, any development arising out of exploration activities is subject to examination under foreign investment policy.
>
> Nevertheless the Government wishes to see, to the extent practicable, a continuing and significant level of Australian involvement in mineral exploration. The Government, therefore expects foreign interests to seek Australian participation in those projects that can reasonably be expected to proceed to the development stage and welcomes the introduction of Australian equity participation into natural resource ventures at the earliest possible stage.
>
> Proposals for the acquisition of an interest in an existing mining business which come within the scope of the Foreign Takeovers Act are examined against the criteria generally applicable to acquisitions of Australian businesses. Subject to Australians having been given the opportunity to acquire the interest, approval would be recommended where it is demonstrated that there are sufficient benefits to offset any costs including the reduction in Australian ownership and control that would be involved.

Naturalization Process

Perhaps the most intriguing and most innovative aspect of the current regulatory regime, as it pertains to mining, is the naturalization scheme. This policy provides a vehicle whereby old established foreign-owned firms can eventually transform themselves into Australian-owned enterprises; the Whitham government's policies contained no such transitional device. In keeping with the objective of this chapter, I will leave the discussion of the rationale and significance of this scheme to the following chapter; at this juncture it will suffice merely to present the formal policy position:[251]

> The Government welcomes proposals by foreign companies to increase Australian participation in their Australian operations. The Government has, therefore, provided a framework and an incentive under the naturalisation provisions of foreign investment policy for companies that are predominantly foreign owned to increase the level of Australian participation in their Australian operations.
>
> Companies that undertake the process of naturalisation may avail themselves of certain benefits. In particular, they are given prior credit for achieving majority Australian ownership, thereby facilitating their participation in new projects and ventures subject to Australian participation guidelines. The Government expects participating companies to naturalise all, or at least the pre-

dominant parts of, their total Australian operations. The naturalisation of only part of a company's operations, such as a new project, would not be consistent with the objective of the naturalisation arrangements which is to achieve an increase in Australian ownership of participating companies' overall operations.

Naturalised and Naturalising Companies

A company may be granted naturalised status by the government if:

i it is at least 51 percent Australian owned;
ii its Articles of Association provide that a majority of members of the board are Australian citizens; and
iii general understandings have been reached between the company, major shareholder interests and the Government about the exercise of voting powers in respect of the company's business in Australia.

A company wishing to naturalise (i.e. a naturalising company) must meet certain pre-conditions. It must:

i have a minimum of 25 percent Australian equity;
ii provide in its Articles of Association for a majority of Australian citizens on its board;
iii give a public commitment to increase Australian equity to 51 percent, subject to agreed understandings between the company, major shareholder interests and the Government, and have regular discussions with the Foreign Investment Review Board on progress towards achieving 51 percent Australian ownership.

A company wishing to naturalise is required to reach an understanding with the government on practical arrangement for achieving 51 percent Australian ownership.

These arrangements include a general understanding with the major shareholder interests of the company on the process of naturalisation and the exercise of voting powers in respect of the company's business in Australia. The government recognizes that the legal obligations of directors of companies to their shareholders may prevent them committing their companies to achieve majority Australian ownership within a specified period of time. However, the understandings between the Government and the companies, involving regular consultations with the Foreign Investment Review Board, are designed to ensure that progress is maintained and that majority Australian ownership is achieved within a reasonable time having regard to the circumstances of the companies concerned. The rights of a naturalising company may be withdrawn if it does not adhere to the understandings reached with the Government.

Foreign portfolio shareholdings are taken into considerationin determining the level of Australian ownership of naturalised or naturalising companies. However, the Government recognises that public companies have only limited ability to influence the proportion of their shares held by overseas portfolio investors. Arrangements may therefore be worked out between the Government and the company concerned to provide for flexibility in meeting required levels of Australian shareholdings in order to cope with variations in foreign portfolio shareholdings, on a case-by-case basis, in the light of the circumstances prevailing at the time.

In respect of voting rights, the Government is concerned to ensure that the operations and policy of a naturalised or naturalising company will be determined by its Australian board and that the proposed control arrangements will ensure the autonomy of the company in relation to the conduct of its own operations and those of any subsidiaries.

The Government expects the process of naturalisation to take place primarily by way of new share issues to Australians to fund new projects and expansions, rather than by acquisitions of Australian businesses. The Government is, however, prepared to examine proposals by naturalising companies to increase their Australian ownership through, for example, a share exchange takeover where that takeover qualifies on its merits for approval under foreign investment policy.

Benefits from naturalisation

A naturalising company may undertake new projects (other than projects in the uranium, finance, insurance, media and civil aviation sectors):

i on its own or in partnership with other naturalised or naturalising companies or with Australian companies (that is, companies that are not regarded as being foreign interests for the purposes of foreign investment policy);
ii jointly with foreign and other companies, provided the level of Australian participation in the new project meets the Australian ownership and control guidelines applicable to the project.

Notification requirements

A company accepted by the Government as a naturalised or naturalising company is not required to notify proposals to develop a new natural resource project that is subject to the Australian equity participation guidelines where it intends to proceed on its own or in partnership with other naturalised or naturalising companies or with Australian companies as described in (i) above. All other proposals must be notified to the Foreign Investment Review Board. Arrangements applying to proposals by naturalised or naturalising companies for new investment outside the natural resources areas of the economy may be the subject of special agreement with the Government.

The naturalisation arrangements do not apply to foreign investment in uranium projects and the obligations of a company under the provisions of the Foreign Takeovers Act are not affected by the status it acquires under those arrangements. Acquisitions by naturalised and naturalising companies remain subject to examination under the Act.

Decision Framework

The Treasurer, in his initial announcement of the guidelines on 1 April 1976, indicated that proposals reviewable under the guidelines would be decided upon within 90 days;[252] if at the end of this period no decision had been transmitted to the investor, the proposal was deemed to be acceptable to the government. Proposals subject to review under the Foreign Takeovers Act (1975) were to be made within 120 days; otherwise the proposal could, *de facto*, proceed. It should be stated that, in the first instance, decisions are to be made by the Treasurer within 30 days. If it becomes apparent that more time is needed, notice is given to the investor which has the effect of giving FIRB another 90 days in which to consider the proposal.

Summary

In this chapter I have attempted to present the current decision-making framework facing foreign direct investors in the mineral sector. Now it is time to explore the actual operating experience of this regime and to subject it to scrutiny and evaluation.

6. An Analysis of the Australian System

Introduction

This chapter will first address the operating performance of the Australian government's foreign direct investment regulatory system as it applies to the mineral sector as at February 1983.[253] This will be followed by an assessment of the distributional consequences of the policy. The chapter concludes with a discussion of possible changes to the scheme within the forseeable future.

Processing Time

As shown in table 12, the average processing time, for all proposals for which a decision was made during the 1976-82 period, has varied between 19 and 31 days; this is an amazingly short time but it should be stressed that FIRB encourages proponents to hold preliminary discussions with the board before formal submissions are lodged.

TABLE 12

Average Processing Time, All Foreign Investment Proposals, 1976-81 (Days)

Type of Proposal	1976/77	1977/78	1978/79	1979/80	1980/81
Approved without conditions	21.3	18.2	18.1	19.2	23
Conditionally approved	23.7	20.2	26.6	25.7	29
Total approved	22.3	18.8	20.8	21.2	25
Rejected	56.7	53.1	42.3	49.6	33
Total decided	22.5	19.1	21.0	21.7	26

Source: Derived from Foreign Investment Review Board, *Annual Report* (Canberra: Australian Government Publishing Service, various years).

Disaggregation of the data reveals a significant difference in average processing time between the takeover and new business categories. From tables 13 and 14, it is apparent that the mean decision time for new business proposals is approximately twice that required for all reviewable submissions; for example, in 1979/80, the corresponding figures are 46.2 and 22 days, respectively. Although disaggregated information on the mineral sector is unavailable, it is reasonable to suggest that the new business data, as presented in table 13, is probably reflective of the average time required for all mineral sector decisions. This is due to the fact that takeovers of mineral properties are normally subject to the same guidelines as new mine proposals.

Case Load and Acceptance Rates

As shown in table 14, FIRB generally processes between 1,000 and 1,300 submissions per year, the vast majority of which are reviewable under the Foreign Takeovers Act 1975. In 1982, 197 of the 1,333 cases subject to review were related to the mineral sector, with 17 of these being new mine proposals.[254]

At this juncture, let us focus on the results of the decision process.[255] It is apparent that, as the critics allege, the Treasurer rejects very few proposals. However, this does not necessarily mean that it acts as a welcoming committee for foreign direct investment. The data indicate that over the first three years of FIRB's existence less than 1 percent of all proposals were rejected. However, to this should be

TABLE 13

Average Processing Time, New Business Foreign Investment Proposals, 1976-80
(Days)

Type of Proposal	1976/77	1977/78	1978/79	1979/80
Approved without conditions	36	44	21	33
Conditionally approved	42	38	42	45
Total approved	39.3	40.9	37.2	41.0
Rejected	82	67	61	70
Total decided	42.0	43.6	37.7	46.2

Source: Derived from Foreign Investment Review Board, *Annual Report* (Canberra: Australian Government Publishing Service, various years).

TABLE 14

Total Foreign Investment Proposals, 1 April 1976 to 30 June 1982

Type of Proposal	1976/77[a]		1977/78		1978/79		1979/80		1980/81		1981/82	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Approved without conditions	692	57.3	764	68.6	591	65.1	757	65.4	710	55.2	847	63.5
Conditionally approved	450	37.8	312	28.0	287	31.6	329	28.4	462	35.9	362	27.2
Total approved	1,142	94.6	1,076	96.6	878	96.7	1,086	93.8	1,172	91.1	1,209	90.7
Rejected	7	0.6	9	0.8	6	0.7	20	1.8	40	3.1	47	3.5
Withdrawn	58	4.8	29	2.6	24	2.6	51	4.4	74	5.8	77	5.8
Total rejected or withdrawn	65	5.4	38	3.4	30	3.3	71	6.2	114	8.9	124	9.3
Total decided or withdrawn	1,207	100.0	1,114	100.0	908	100.0	1,157	100.0	1,286	100.0	1,333	100.0

Source: Derived from Foreign Investment Review Board, *1982 Annual Report* (Canberra: Australian Government Publishing Services, 1982), p. 82.

[a] April 1976 to June 1977.

added the withdrawals, which ranged from 2.6 to 4.8 percent of all applications; this statement is predicated on the perception, albeit unsubstantiated, that most withdrawals are made as a face-saving device rather than for purely commercial reasons. Even with this recategorization exercise, between 1976 and 1979 95 to 97 percent of all proposals were ultimately accepted, although approximately one third of these carried obligations or restrictions of one form or another.

It is interesting to note that even FIRB's harshest critics assert that it started to interpret the guidelines in a more restrictive manner in late 1979.[256] For example, McQueen states:

> A tame Foreign Investment Review Board was set up in 1976. Both sides of the Parliament supported the principle of 50 percent Australian ownership of mining venture. Except for 1972 to 1975 and again *after 1979*, this requirement was bent as often as it was upheld.[257]

The aggregate data appear to support the view that the decision process became more rigorous in 1979/80. Note that in that year the rejection rate more than doubled from that of the preceding year, to 1.8 percent; the corresponding figure for 1980/81 rose to 3.1 percent. The fact that withdrawals increased by more than 300 percent over the same period further suggests a more rigorous evaluation process.

Although the 'decision' data employed above allow one to draw inferences about the relative rigour of the system over time, they undoubtedly lead, as FIRB stresses,[258] to a serious underestimation of the absolute severity of the scheme. Hence, any regulatory regime which is characterized by relatively precise rules and the provision of honest and open advice at the presubmission stage should be expected to display a low rejection rate. In other words, the Australian regime may be more restrictive towards FDI than its Canadian counterpart but yet display a higher acceptance rate, with the reason for the discrepancy being the ambiguity surrounding the Canadian decision-making process and the relative clarity of its Australian counterpart. More on this subject will be contained in the following chapter.

Before moving on to discuss FIRB's activities with respect to the mineral sector only, it may be useful to explore the magnitude of foreign investment, both actual and planned, in the Australian economy. First, let us address the former measure. From table 15, it is apparent that the amount of FDI in Australian enterprises, both in terms of constant dollar expenditure and as a proportion of total net private investment expenditure, declined drastically after 1972. Although the policy makers obviously wanted to restrict FDI to some extent, it is unlikely that such a sharp drop was either expected or desired. In recent years the level of FDI has again reached pre-1972 levels, when expressed as a percentage of total net private investment expenditure.

TABLE 15

Foreign Investment in Enterprises in Australia, 1970/71 to 1981/82

Year	At current prices ($A million)	At 1979/80 prices[a] ($A million)	As a proportion of gross domestic product (percent)	As a proportion of net private investment expenditure[b] (percent)
1970/71	1,590	4,119	4.7	38.0
1971/72	1,454	3,538	3.9	34.1
1972/73	471	1,073	1.1	10.8
1973/74	496	994	1.0	7.5
1974/75	1,003	1,650	1.6	13.2
1975/76	858	1,213	1.2	10.5
1976/77	1,549	1,957	1.9	15.7
1977/78	1,330	1,561	1.5	15.3
1978/79	2,051	2,258	2.0	17.5
1979/80	2,961	3,094	2.7	22.2
1980/81	5,625	5,189	4.4	34.1
1981/82	9,518	7,751	6.4	44.0

Source: Foreign Investment Review Board, *1982 Report* (Canberra: Australian Government Publishing Service, 1982), p. 36.

[a] Using the implicit price deflator for gross non-farm domestic product.

[b] Gross private fixed capital expenditure plus increase in book value of private non-farm stocks less total depreciation allowances (other than those of public enterprises).

[c] Since 1980, the Australian dollar ($A) has fluctuated between $1.06 and $1.42 Canadian ($C). Throughout most of this period it has been in the $1.30 to $1.35C range. Recent estimates are: 10 July 1982, $1A = $1.32C (*Financial Post*, p. 24); 25 November 1982, $1A = $1.17C (*Globe and Mail*, Toronto, p. B6); 13 April 1983, $1A = $1.07C (*Globe and Mail*, Toronto, p. B6).

However, given the lags between planned and actual investment, the nature of post-1981 FDI trends can be better seen from table 16, which presents expected future investments as reflected in the proposals submitted by foreign investors to the review board: it rose from $A 3.8 to $A 7.1 billion over period from 1978/79 to 1980/81. The 1981/82 data reflect a slight downward trend that is undoubtedly attributable, in large part, to the depressed state of the world oil and metal markets.[259]

Interpretation of the data is difficult. On the one hand the significant rise in FDI can be interpreted with alarm and as an indication that

TABLE 16

Foreign Investment Proposals, Total Expected Investment 1 April 1976 to 30 June 1982
($A million)

	1976/77[a]	1977/78	1978/79	1979/80	1980/81	1981/82
Approved without conditions	2,340	783	1,108	1,439	1,585	2,021
Conditionally approved	1,263	2,208	2,413	4,369	5,033	3,426
Total approved	3,603	2,991	3,521	5,808	6,618	5,447
Rejected	56	11	352	488	510	166
Total decided	3,659	3,002	3,873	6,296	7,128	5,613

Source: Foreign Investment Review Board, *1982 Report* (Canberra: Australian Government Publishing Service, 1982), p. 82.

[a] April 1976 to June 1977.

the regulatory regime is not working as it should. Alternatively, it can be stated that the prevailing trends demonstrate that properly designed regulatory systems can simultaneously perform well with repect to both economic growth and economic nationalism. Let us explore this issue further within the context of the mineral sector only.

FIRB and the Mineral Sector

The available data reaffirm the widely held view that the mineral sector has been the focal point of foreign investor interest. From table 17 it is clear that FDI is generally channeled into new business (mines) projects as opposed to the purchase of existing ventures; this, of course, has a significant impact on the nation's potential gross national product. Although year-to-year fluctuations are rather large, 45.3 percent of all intended FDI in the Australian economy since 1976-77 has been targeted towards mining activities. As shown in table 18, the uranium and coal industries have been primary recipients of these funds.

In the new business domain, as shown in table 19, the number of mine proposals is rather small, ranging from 7 to 17 in each of the past six years. Nevertheless, they account for between 20 and 43 percent of all such proposals by volume and 49 to 97 percent by dollar value. Although virtually all mine construction and acquisition proposals are ultimately approved, conditions are attached; the restrictions most fre-

TABLE 17

Foreign Investment Proposals, Total Expected Expenditure in Mineral Exploration and Development, 1976-82 ($A million and percent[a])

	1976/77		1977/78		1978/79		1979/80		1980/81		1981/82	
	$	%	$	%	$	%	$	%	$	%	$	%
Acquisitions	651.0	60.0	N/A	N/A	396.5	21.7	827.4	34.8	1,233.0	30.9	590.6	17.7
New Businesses	2,176.0	96.5	1,073.5	59.1	715.5	48.8	2,384.7	69.6	1,372.4	52.3	1,532.0	72.3
All Proposals	2,827.0	78.5	N/A	N/A	1,112.0	31.6	3,212.1	55.3	2,605.4	39.4	2,122.6	39.0

Source: Derived from Foreign Investment Review Board, *Annual Report* (Canberra: Australian Government Publishing Service, Various Years).

[a] Mineral exploration and development expected expenditure as a percentage of total expected expenditures across all sectors of the economy.

TABLE 18

Foreign Investment Proposals: Mining Industry, 1 July 1978 to 30 June 1982
(number and $A million)

	1978/79		1979/80		1980/81		1981/82	
	No.	$	No.	$	No.	$	No.	$
Mineral exploration:								
Coal	1	0.4	5	21.0	7	24.8	3	38.8
Uranium	18	5.6	14	6.2	7	100.4	8	1.9
Petroleum and natural gas	16	25.6	24	79.0	21	37.0	50	140.6
Base and precious metals	92	46.4	71	50.8	97	336.8	64	63.4
Total mineral exploration	127	78.1	114	157.0	132	499.1	125	244.7
Mineral development:								
Coal	12	322.2	22	1,439.5	19	1,600.2	19	798.9
Uranium	4	504.6	2	1,055.0	4	122.2	3	668.0
Petroleum and natural gas	2	18.6	4	20.0	2	2.5	10	79.6
Base and precious metals	24	188.6	35	534.1	37	361.2	27	255.1
Total mineral development	42	1,033.9	63	3,048.6	62	2,086.1	59	1,801.5
Services to mining	3	0.2	8	6.4	12	20.2	13	76.4
Mineral processing[a]	3	552.0	4	1,009.3	13	1,010.6	11	3.0
Total mining industry[b]	175	1,664.2	189	4,221.4	219	3,616.0	208	2,125.6

Source: Foreign Investment Review Board, *1982 Report* (Canberra: Australian Government Publishing Service, 1982), p. 64.

[a] Smelting and refining of copper, nickel, nonferrous metals, silver/lead/zinc, alumina and aluminium smelting. Excludes crude petroleum refining.

[b] Totals may not add due to rounding.

quently relate to future equity participation. In summary, given the existence of, and recent insistence on, the 50/50 rule, it is not surprising that the rejection rate is virtually nil.

Before moving into specifics of the mineral sector rulings, let us briefly address the source of FDI in this area. From table 20, it is apparent that the USA and the UK are the single most important investors in mining activities but, given the large, indivisible nature of such projects, substantial year-to-year variation is to be expected. As an illustration of this phenomenon, the 1979/80 data are dominated by the North-

TABLE 19

Establishment of New Mineral Development Businesses, 1976-81

	1976/77	1977/78	1978/79	1979/80	1980/81	1981/82
Number of proposals:						
Approved	2	3	1	1	3	6
Conditionally approved	13	4	13	13	5	11
Total number	15	7	14	14	8	17
Mineral development proposals as percent of total new business proposals	33	20	29	38	25	43
Expected new investment:						
Approved ($A m)	N/A	N/A	N/A	5.2	119.0	283.4
Conditionally approved ($A m)	N/A	N/A	N/A	2,379.5	1,253.4	1,248.6
Total ($A m)	2,176.0	1,073.5	715.5	2,384.7	1,372.4	1,532.0
Mineral development investment as a percent of total new business investment	96.5	59.1	48.8	69.6	52.3	72.3

Source: Derived from Foreign Investment Review Board, *Annual Reports* (Canberra: Australian Government Publishing Service, various years).

[a] April 1976 to June 1977.

West Shelf natural gas project which involves a UK investment of approximately $1.1 billion. Two additional comments are in order with respect to table 20. First, Japanese investment in mining activities (largely in black coal) has risen substantially in recent years; Japan has replaced the UK as the second most important foreign direct investor. Second, the column denoted as 'Australian' represents the participation by nonforeigners in foreign initiated ventures. This type of investment constitutes, at least in recent years, a relatively constant 35-40 percent of the total.

Decision Record in the Mineral Sector

As previously stated, many commentators have asserted that FIRB has since late 1979 adopted a more rigorous stance in evaluating proposals

TABLE 20

Country of Proposer: Total Expected Investment in the Mineral Industry, 1 July 1978 to 30 June 1981 ($A million)

		EEC						
	USA	UK	FRG	Other	Japan	Australia	Other	Total
1978/79:								
$ million	338	215	52	15	49	392	51	1,112
% of min. development	30.4	19.3	4.7	1.3	4.4	35.3	4.6	100.0
1979/80:								
$ million	283.9	1,265.2	66.1	210.5	158.8	1,153.5	74.1	3,212.1
% of min. development	8.9	39.4	2.1	6.6	4.9	36.0	2.3	100.0
1980/81:								
$ million	576.7	301.1	82.9	157.8	231.5	934.8	320.6	2,605.4
% of min. development	22.1	11.6	3.2	6.1	8.9	35.9	12.3	100.0
1981/82:								
$ million	396.9	173.9	2.9	30.6	244.7	838.1	433.5	2,122.6
% of min. development	18.7	8.2	0.1	1.4	11.5	39.5	20.5	100.0

Source: Foreign Investment Review Board, *1982 Report* (Canberra: Australian Government Publishing Service, 1982), p. 65.

[a] Belgium, Denmark, France, Ireland, Italy, Luxembourg, and the Netherlands.

[b] The expenditure identified as originating from Australia represents the expected contribution by Australian-controlled companies and Australian residents to the total expenditure associated with foreign investment proposals.

from the resource area. The empirical evidence, such as it is, is clearly supportive of this school of thought. It suggests that FIRB has primarily relied on, and only on, the 'special sector' criterion when making its recommendations to the Treasurer. That is, if a project meets the 50/50 rule with respect to equity holdings and board composition, it is automatically considered to have satisfied the 'not against the national interest' test. During my research, I did not find reference to a single exception to this statement.

On the other hand, failure to meet the requirements of the 50/50 rule has not always led to rejection of the proposal. As the mining sector criterion suggests, if the project is, in itself, 'not contrary to the national interest' it may, in certain circumstances be allowed to proceed; however, the government will normally grant approval only on the condition that Australian equity reach 50 percent prior to the commencement of commercial production. It appears that, in cases where the 50/50 rule is not initially met, the FIRB's decision on whether to grant an unconditional exemption or a conditional acceptance, or to reject the proposal, is largely based on the existing level of foreign ownership in the sector and on technological factors. Both of these items are covered under the general guidelines.

The above points are best illustrated by reviewing FIRB's historical decision record in the mineral sector. Since the inception of the guidelines on 1 April 1976, the black coal sector has been singled out for special attention. This was undoubtedly due to the rising proportion of foreign ownership in the sector and the increasing importance of coal as a fuel source in the post-OPEC environment. The reader will recall the data presented in the previous chapter where it was shown that, between 1972 and 1975, foreign ownership of black coal increased from 33 percent to 62 percent.

The government's response was to apply the equity guidelines strictly to new projects in this industry: the eighteen new black coal projects approved by FIRB over the period 1 April 1976 to 30 June 1982 either initially met the 50 percent local ownership requirement or were required to do so prior to the initiation of commercial production.[260],[261] These data are confirmed by the following government statements. First, according to the then Treasurer:

> Of the *seventeen* new coal projects examined from the inception of the Foreign Investment Review Board in April 1976 to the end of March 1981, *fifteen* have been approved.
>
> *Eleven* have fully met the Australian equity guidelines, *two* have been approved subject to meeting the guideline level when production commences or as soon as possible thereafter and *two* have been approved at the exploration

state only. Any subsequent development of these projects will require examination to ensure that they meet the Australian equity participation guidelines.[262]

Second, the decision record over the period from 1 July 1981 to 30 June 1982 is outlined in FIRB's *1982 Report*:

> ... foreign investment approval was sought for and given to only three steaming coal projects in 1981-82 expected to be developed at a total cost of $415 million. ... Each of the projects, Mt. Thorley, Gloucester and Redbank Plains, satisfied the Government's 50 percent Australian participation guidelines.[263]

The government's record in enforcing the equity guidelines in respect of takeovers of existing black coal producers is equally rigorous. Since 1 April 1976, only two such transactions were approved without the 50 percent local equity participation being met at the time of approval.[264] In the other two cases, arrangements made with the companies involved will ensure future introduction of at least 50 percent Australian equity.[265]

In the overall mineral sector, the decision record has been less consistent than that encountered in the black coal industry. In particular, prior to 1979, the flexibility provided in the rules was used more often than in more recent times. For instance, the uranium area was characterized by two major rulings that appear to deviate from the 75/25 rule: the Yeelirrie and Roxby Down cases.[266] Price and White note the existance of similar deviations, in the pre-1979 period, within other mineral sectors:

> examples of the application of this discretion can be seen in the West Australian nickel project which was approved with less than 20 percent Australian equity; in the partial takeover of the Robe River iron ore project resulting in a 30 percent local equity, ...[267]

The decision record in the overall mineral sector, over the period 1 April 1976 to 30 June 1982 is as follows:[268]

> Of the 55 new natural resource projects which have come before the Board, 32 have provided for at least the guideline level of Australian equity and two integrated mining/manufacturing projects provided for Australian equity levels that were considered to be satisfactory. A further 20 projects were required, as a condition of approval, to increase Australian participation to the guideline level or to seek to take-up opportunities to do so. Of these 20 projects, four have subsequently met the guidelines or have made firm plans to sell equity to Australian interests and eight were required to meet the guideline prior to the commencement of production or as soon as possible thereafter. The remaining project provided for 48 percent Australian equity. A very high proportion of projects have been commenced, therefore, or will commence, production with at least the guideline level of Australian participation.

In the 36-month period commencing 1 July 1979, 27 new natural resource projects were considered and approved by the government. Although none of the proposals were rejected, all of them either initially met the 50/50 rule or were approved on the condition that the 50-percent Australian equity target had to be met before these ventures commenced commercial production.[269]

In closing, it appears as if FIRB has conscientiously applied the 'special sector' rules to the mineral sector. However, rather than treating them as a necessary but not a sufficient condition, as ministerial speeches suggest to be the case, they appear to have been employed as a sufficient but not necessary criterion. Although such exceptions have been granted rather infrequently in recent years, charges have arisen over time that the Fraser government has relaxed the guidelines[270] since they were first promulgated by Mr. Lynch on 1 April 1976.[271] Let us now turn to an assessment of such accusations.

GUIDELINE FLEXIBILITY

As discussed in chapter 5, one of the major differences between the Fraser and Whitlam governments' guidelines with respect to the mineral sector was the increased flexibility given to FIRB and the Treasurer by the policy statement of 1 April 1976. For example, rather than insisting on a strict interpretation of the 50/50 rule, Mr. Lynch announced that:

> Proposals that are not contrary to the national interest but which do not meet the guideline of a minimum of 50 percent Australian equity may be allowed to proceed if the Government judges that the unavailability of sufficient Australian equity capital on reasonable terms and conditions would unduly delay the development of Australia's natural resources. In the event, however, the Government will, as appropriate, seek satisfactory arrangements for Australian equity to be increased to at least 50 percent within an agreed period.[272]

In one sense this obviously amounts to a relaxation of the guidelines in that projects may now proceed that would not previously have met the criteria. However, administrative flexibility is a virtual prerequisite for political decision making and, even more to the point, the key issue is the degree and purpose to which the so-called 'escape clauses' are utilized.

A further example, according to the critics, of the Fraser government's relaxation of the guidelines was the 1 April 1976 change of uranium mining rules. Under the rules inherited from the Whitlam government, 100 percent Australian ownership was required of all new uranium mines utilizing orebodies found on land for which the permits were issued after 24 September 1975.[273] All new mines utilizing orebodies found on existing leases were to have their foreign/domestic ownership structure established through negotiation. In contrast, the Fraser government's approach was initially to set a 75-percent Australian ownership rule for *all* future mines.[274] Since virtually all of the then-known commercially viable deposits were located on leases issued on or before 24 September 1975, one can only speculate on the type of negotiated settlements that might have occurred, in order to evaluate the relative severity of the two uranium-based policies.

One further major change was made by the Lib/NCP government in April 1976. At this time they eliminated all reference in the general guidelines to reviewing expansions of on-going operations, if such expansion were directed towards established business activities. However, the policy change was of limited relevance to mine operators since all major mining expansions (either through new mines or a major expansion of an existing operation) continued to be subject to the 'special sector' rules.

In general, the above noted changes were not politically contentious. This was due to the fact that even the ALP saw the need for some flexibility in the rules, as is evident from their subsequent policy papers.[275] Hence, the thrust of the 'watering down' charges relates to three announcements by the Treasurer, in which he:

i unveiled the government's naturalization program;
ii stated that the Australian Bureau of Statistics had been instructed to cease collecting and publishing foreign ownership and control data;
iii changed the uranium ownership rules.

I shall now discuss these policy initiatives.

NATURALIZATION SCHEME

On 8 June 1978, the Fraser government introduced a controversial scheme that undoubtedly represents a major relaxation of the FDI regulatory system as it applies to the mineral sector. As stated in the prior chapter, the naturalization scheme[276] allows companies which are at least 25 percent Australian owned to receive prior approval for 51 percent Australian equity. In return, they publicly agree to move towards the 51-percent target and to ensure that a majority of the voting members on their Board of Directors are Australian citizens. A company in the transition stage is denoted as a naturalizing or Australianizing company, whereas one that has reached its ownership target is denoted as a naturalized or Australianized entity.

In either case such a firm can, without subjecting itself to review, undertake projects in any one of the following ways:

i on its own;
ii in a joint venture with Australian companies;
iii in a joint venture with other naturalized or naturalizing entities.

However, partnerships with foreign-owned firms or takeovers reviewable under the FTO Act 1975 continue to be subject to the normal review process.

The scheme owes its existence to the pressure exerted by CRA Ltd.,[277] a large Australian mining firm controlled by Rio Tinto Zinc of the United Kingdom. After 1973, CRA found itself at a competitive disadvantage in obtaining and developing projects. This was particularly disconcerting to CRA since: it perceived itself to be an Australian corporation in the sense that approximately 27 percent of its share capital was Australian owned; Australian citizens held virtually all of the senior management positions; and the firm had been a 'good' corporate citizen for over 70 years. Therefore, the company's management and shareholders believed that it had a right to be treated differently from newly-arrived foreign entities.

Although the Fraser government agreed that there was need for a transitional mechanism that would facilitate and, indeed, encourage firms to move from foreign to domestic ownership, there was considerable controversy over the issue of timing. That is, should an explicit target date be required by which time CRA, or any other such firm, was to be 51 percent domestically owned?[278] If so, should the date be made public? The government rejected the fixed date approach and settled for a public statement from the naturalized company that it would ultimately attain 51-percent Australian ownership.

The scheme was revealed on 8 June 1978;[279] this was followed in January 1979 by the announcement that CRA had been designated as a naturalizing company.[280] To date, four other mining firms have been granted status under the scheme: Ashton Mining N.L. has been given naturalizing status and Mount Isa Mines Ltd., Renison Goldfields Consolidated Limited and Aberfoyle Mining Limited have been designated as naturalized companies. There have been rumours that a number of other firms, such as Caltex, might apply; however, this is not likely to happen until the stock market improves so that the requisite 25-percent Australian equity can be floated without harming the existing shareholders.

Although the advantages to a naturalizing company are obvious, they are less so for naturalized firms. Given that the latter organizations are already 50 percent Australian owned, they could technically meet the special sector rules by merely ensuring that Australian citizens, all of whom may be company employees, constitute a majority of the voting members of the board of directors or the equivalent. The advantages are threefold. First, 'good will' is obtained by a clear indication that a greater commitment is being made to Australia. This may help FIRB and the Treasurer in recommending favourably on takeovers that must still be reviewed. Second, by not having to seek FIRB approval of new business ventures (as long as 50 percent of the share capital is Australian owned), naturalized firms gain flexibility in decision making; they now can react more quickly to changing market conditions. Thirdly, and probably the most important of all, is the possibility that in the future, especially in areas of high foreign ownership, the 50/50 rule may no longer be a sufficient condition for acceptance. That is, FIRB could start insisting on conditions over and beyond the 50/50 rule. For example, the review board might require a higher level of local ownership or it might start to impose restrictions on property resales or on the level of Australian content with respect to the purchase of supplies and services. Hence, by obtaining naturalized status, a firm could avoid having to satisfy such time-consuming and potentially troublesome restrictions.

In general, the public debate has focused on the naturalizing rather than the naturalized firms. This is to be expected, since the former procedure conveys substantially more benefits to the status holder than does the latter. Undoubtedly the feature most often attacked is the provision for granting prior credit for 51 percent Australian ownership when the actual level may be as low as 25 percent.[281] Similarly, as discussed above, the lack of a fixed date system with respect to the attainment of the 51-percent objective is the source of widespread concern.

Equally disturbing to the critics is the provision in the policy which allows two or more naturalizing firms to engage in a joint venture and still escape the review process. Up to the present time, there has been only one reported case of this type: the Ashton diamond project in the Kimberley Mountains of Western Australia. In 1978, Ashton Mining N.L., which is controlled by the Malaysian government, operating in a joint venture arrangement with CRA Ltd., sought permission to proceed with the project. Initially the consortium possessed only 36 percent Australian equity. After CRA Ltd. obtained naturalizing status, the project's deemed Australian content climbed to 48 percent; it further escalated to 54 percent when Ashton Mining N.L. received a similar designation.[282] Hence, the venture now readily meets the requirements of the 50/50 rule. Given that the Kimberley deposit is expected to be one of the largest and most profitable diamond ventures in the world, a significant amount of rent may escape from the country.[283] This outcome is aided by the modest royalty rate levied by the Western Australia government on the project's output.

In order to receive maximum benefits from the Australianization program, the government very carefully stated:

> The government will expect the process of naturalisation to take place primarily by way of new share issues to Australians to fund new projects and expansions, rather than by takeovers which remain subject to case-by-case examination under the Foreign Take-overs Act.[284]

This qualification was necessary to meet the criticism of the indigenous business community, some of whom believed that the scheme would encourage takeovers of small Australian-based resource firms in order to meet the 51-percent ownership target.[285] Nevertheless, part of CRA's success in moving towards a higher level of domestic participation has been accomplished through the share acquisition route.[286]

In summary, the naturalization program was initially seen by the critics as a major step towards the emasculation of the regulatory system. However, with the exception of the Ashton Mining Venture and CRA's relatively minor efforts to increase its Australian equity percentage by share acquisitions, the worst fears of the opponents have not been realized. Indeed, it is rather surprising that more firms have not opted for the scheme. One explanation is that the most likely candidates are international oil companies, but since most of them are 100 percent foreign owned, they would first have to float large share offerings to get up to the entry level of 25 percent Australian ownership. Given the magnitude of the required floats and the current state of the stock market, such undertakings will not take place until the economy reaches a more buoyant state. Even then, care will have to be taken to ensure that the market is not flooded by several simultaneous floats.

CESSATION OF PUBLICATION OF FOREIGN OWNERSHIP DATA

Although not as severely criticized as the naturalization scheme or the changes to the uranium rules that will be discussed below, the announcement by the Treasurer in June 1978 that the Australian Bureau of Statistics (ABS) would no longer collect and publish foreign ownership and control data was met by a great deal of skepticism. The official reason was purportedly cost reduction, although all of the staff involved in the division were reassigned elsewhere within the ABS.[287]

As expected, the move was widely interpreted as an attempt by the government to suppress information that would support the critics' claims that the government's lax approach since 1976 had led to a significant rise in foreign ownership and control levels. According to this school of thought, further support for their views was provided by the Treasurer himself, when he announced, in January 1982, that he had instructed the ABS to resume collection of the above noted information.[288] The critics suggest that the rationale for the announcement is obvious: the Fraser government's actions since mid-1979 have led to a reduction in the level of foreign ownership and control of the economy. Hence, the dissemination of such data is now 'good' politics.

One must wait until the data are actually published to see if the above scenario has merit, but the available, albeit circumstantial, evidence support the hypothesis. For example, in its *1982 Report*, the FIRB states:

> The likelihood is that the level of foreign ownership and control of the mining industry has fallen since comprehensive statistics were last collected.[289]

Additional support is provided by McKern;[290] as shown in table 21, he estimates that from July 1979 to June 1985, Australia ownership of the mining industry is expected to increase from 47.4 percent to 52.6 percent. These findings led McKern to state that:

> In view of the government's policy objective of limiting foreign ownership to no more than 50 percent in the industry, the projected ownership pattern represents a vindication of that policy.[291]

URANIUM INDUSTRY

The most recent change in the foreign investment rules was announced by the Treasurer on 10 June 1979.[292] On this occasion he indicated that, although the government still wished to see a minimum of 75 percent Australian ownership in all new uranium mines, alternative proposals would be entertained when this level of domestic ownership was clearly unattainable. He went on to describe alternative conditions for approval.

> In such cases, it would need to be demonstrated satisfactorily that:
>
> i 75 percent Australian equity is unavailable;
> ii the project would be of *significant economic benefit* to Australia;
> iii there would be at least 50 percent Australian equity;
> iv Australian participants would have the major role in determining the policy of the project.
>
> Where projects do not have 75 percent Australian equity and Australian control, arrangements may be required to increase Australian participation over an agreed period.[293]

As a consequence of this change in policy, the Fraser government provided itself with sufficient flexibility to be able to handle two difficult cases that were before the FIRB. Interestingly, both of these proposals involved Western Mining Corporation (WMC), a large domestic mining concern and a member of the Melbourne financial community,

TABLE 21

Estimated Assests and Direct Ownership: Australian Mining Industry, 1979/80 and 1984/85
($A million and percent)

	Australian		Foreign		Total
	$	%	$	%	$
Total assets base 1972/73[a]	3,344	46.7	3,811	53.3	7,155
Increase 1972/73 to 1979/80[b]	3,674	48.0[c]	3,980	52.0[c]	7,654
Total assets at 79/80	7,018	47.4	7,791	52.6	14,809
New investments to 84/85[d]	13,020	55.8	10,290	44.2	23,310
Total assets at June 85	20,038	52.6	18,081	47.4	38,119

Source: Bruce McKern, 'Overseas Investment in Resources', in Stuart Harris and Geoff Taylor, editors, *Resource Development and the Future of Australian Society* (Canberra: Centre for Resource and Environmental Studies, Australian National University, 1982), p. 212.

[a] R.B. McKern, *Multinational Enterprise and Natural Resources* (Sydney: McGraw-Hill, 1976), table 3.8.

[b] At current prices: estimated from Australian Bureau of Statistics (various), Department of Industry and Commerce, *Major Manufacturing and Mining Investment Projects* (Canberra: Australian Government Publishing Service, 1980).

[c] Based on foreign ownership known as of 1974/75, as given in Australian Bureau of Statistics, *Foreign Ownership and Control of the Mining Industry,* (Canberra: Australian Bureau of Statistics, 1976).

[d] Calculated from estimates of major mining projects 'committed' or at 'final feasibility' stage, from Department of Industry and Commerce, (1980). Only mining and minerals processing projects exceeding $50 million investments are included. T.S. Tsung, 'The Impact of the Resources Boom on the Australian Economy', Economic Research Report No. 142 (Sydney: Commercial Banking Co. Ltd., 1981).

which coincidentally constituted much of Malcolm Fraser's political power base.

First, let us consider the Roxby Downs proposal.[294] The project was owned 51 percent by WMC and 49 percent by British Petroleum; hence it met the mining sector guidelines but not those applying to uranium mining. Fortunately for the proponents, the project is a multiproduct mine; in fact, according to some observers, the development could be justified on the basis of either copper or uranium extraction alone. The mine was expected to provide a major boost to South Australia's ailing economy. For this reason, the project became the focal point of a major political controversy, with the state's Liberal Party (then in opposition) pushing for its construction. The new guidelines, along with the multiproduct argument, gave the Fraser government the flexibility and rationale it needed to approve the mine.

The second case was even more contentious and once again involved state and federal politics. WMC, along with Esso Australia and Urangesellschaft wished to obtain permission to produce uranium oxide from their Yeelirrie orebody located in Western Australia.[295] Although WMC held 75 percent of the equity, with Esso and Urangesellschaft holding 15 and 10 percent, respectively, Esso was to put up 50 percent of the cost and receive 50 percent of the product. This essentially amounted to WMC, Esso and Urangesellschaft sharing profits in the ratio of 40:50:10. If this logic is accepted, then only 40 percent of the effective equity was Australian owned, which clearly violates not only the existing uranium rules but also those applying to the non-uranium mining industry. As in the Roxby Downs case, the federal government was under intense pressure from Premier Court of Western Australia to approve the project because of the economic contribution it would make to the Western Australian economy.

The Fraser regime ultimately approved the project,[296] in large part because it had not clearly spelled out the rules relating to non-equity profit sharing and control mechanisms. Despite having approved the Yeelirrie project, the Treasurer made it quite clear that such financial arrangements would not be condoned in subsequent proposals. His statement outlined the factors that the government would henceforth take into consideration:

> the extent and nature of financing and prepayment arrangements, participating interests, profit sharing arrangements and other arrangements not necessarily associated with legal ownership of the assets of a project but which confer on the participant the right to receive benefits from a project, and management arrangements affecting control of the project.[297]

Although approval of the Yeelirrie project obviously represented a relaxation of the rules, it did increase FIRB's awareness of non-equity methods of control.[298] It should be stated at this point that pressure will undoubtedly continue to be applied by the mining industry to have the 50/50 rule apply to uranium as it does to all other minerals,[299] the reason being that mining firms and related groups cannot see any difference between uranium mining and any other extractive process. They are, of course, correct from a technological perspective but this ignores the politics of the situation: the anti-uranium lobby believes that there is a major difference between materials utilized in the nuclear fuel cycle and those destined for other end uses.[300]

Ownership Versus Control

As suggested in chapter 2, economic nationalists are not a homogeneous group. Although the categorizations are arbitrary, we might say that those people who are concerned largely with the issue of net benefits or economic rent tend to focus on ownership structure. That is, they wish to ensure that a substantial proportion of the benefits generated by exploitation of a society's nonrenewable resource base are captured by citizens of that society. If this is not done by way of taxation or public ownership, then they will advocate restrictions on foreign direct investment in extractive corporations. The control advocates are more concerned with issues of national sovereignty, extraterritorial application of foreign laws, exportation and importation behaviour of foreign firms, and the transfer of technology.[301]

Perhaps the major reason that most FDI control regimes end up focusing on ownership rather than control is the difficulty of measuring the latter concept: what is meant by control; when is it deemed to have transferred from one interest to another; where does control reside? These are only some of the definitional problems facing policy analysts. In most cases, the solution employed involves, in one fashion or another, using ownership levels as a proxy for control. The end result appears to be a gradual transfer of bureaucratic focus from control issues to the more quantifiable concept of ownership. The Australian approach towards FDI regulation in the mineral sector provides an excellent example of the above proposition. Even though the Foreign Take-over Act 1975 is predicated upon a change of control prior to initiation of action, the system is largely based on ownership levels. Recall that, if a foreign interest (one in which a single foreign entity owns at least 15 percent of the shares or where the total foreign holdings exceed 40 percent of the voting stock) acquires or increases a substantial interest (defined to exist where a single foreign interest owns 15 percent or more of the voting shares or where aggregate foreign interests own 40 percent or more of the voting shares) in an Australian business, then the transaction is reviewable unless the proponents can demonstrate that control has not changed hands or has not increased (if control previously was deemed to reside with the proponents).

If reviewable, it is normally required that the special sector rules be met either outright or prior to the commencement of commercial production. That is, the attainment of 50 percent domestic ownership is the dominant factor in the decision process. Although at least half of the board members must be Australian citizens, there appears to be no concern over their degree of independence; that is, they can all be employees of foreign companies.

The applicable test applied to new mining projects appears to place little emphasis on the issue of effective Australian control: the 50/50 rule is the dominant decision criteria. A further illustration of this concern can be found by looking at the naturalization process. The government appears to be satisfied if foreign corporations such as CRA and Renison Goldfields reach 51 percent Australian ownership. Although this level of ownership, considered in conjunction with the corporate and mining tax structure, will result in a significant proportion of the economic rent remaining within Australia, it does little with respect to the issue of control. Clearly, if 49 percent of the shares are held by one foreign interest and 51 percent are widely diffused among thousands of Australians, control must reside with the former group.

In summary, if one believes that the key issue is control, then the Australian scheme would appear to be seriously flawed. Alternatively, if one believes that the critical issues are those of ensuring that a significant proportion of economic rent remains within Australia,[302] transfer pricing opportunities are minimized, and the desires of economic patriots are addressed, then the current regime is satisfactory. This is particularly so if one is also seeking a politically acceptable trade-off with growth objectives.

The Post-1979 Period

As discussed previously, there is reason to believe that mid-1979 was a critical switch-over point in terms of FIRB's operating philosophy. Prior to that time, there appeared to be a continual relaxation of the rules to facilitate numerous exceptions to the spirit of the April 1976 guidelines. Examples of such behaviour are the introduction of the naturalization scheme, approval of a uranium project with a *de facto* 40-percent domestic ownership level, and an extremely low rejection rate of all types of proposals. However, FIRB now takes great pride in stressing the fact that all new resource projects approved after July 1979 either exhibited 50 percent local equity at the time of acceptance or were required to attain that level prior to the commencement of commercial production.[303] This rather sudden change in behaviour requires an explanation.

It is my opinion that the underlying motivation related to the Fraser government's desire to ensure that Australians would be the primary beneficiaries of the resources boom. Support for this hypothesis can be found in Treasury reports; for example, in an unpublished document dated May 1980, the major objective of the government's resource policies was said to be 'the pursuit of policies that will capture the maximum proportion of the potential gains for Australians'.[304] This was elaborated upon as follows:

> In addition to managing the economy in a way that maximizes the opportunity for growth and additional incomes, policy will need also to be concerned with the extent to which these income gains accrue to Australians. This general objective is important partly because of the desirability of retaining the highest possible proportion of the increased wealth in Australian hands and partly also because the expenditure of that increased wealth in Australia will be an important source of future growth.[305]

Perhaps the greatest challenge facing the government in this regard was presented by the bauxite/alumina/aluminium industry. Not only were existing levels of foreign ownership extremely high, as shown in table 22, but several states appeared to be engaged in an electricity rate-bidding war to entice further smelter construction.[306] Hence, not only might rents be lost due to foreign ownership of the bauxite deposits, but also due to the possible under-pricing of electricity. The latter outcome means that rents are being foregone on the nation's coal deposits. Added to these concerns was the traditional transfer pricing problem associated with the vertically integrated aluminum industry.

These issues were ultimately investigated by the Senate Standing Committee on Natural Resources. Their 1981 report presents a clear picture of the problems facing the government. First, with respect to foreign ownership, the report states:

> A significant degree of foreign participation is inevitable to provide access to markets, technology and capital. This is not a cause for anxiety if the level of foreign ownership is kept under constant public scrutiny and if the taxation system operates effectively to ensure that foreign participation does not result in a loss of revenue to the community as a whole.[307]

However, the report goes on to discuss taxation issues:

> The function of the taxation system is to ensure that the Australian community as a whole receives a fair return on resources employed and profits generated within the aluminum industry. The present uncoordinated range of State and Federal taxes and royalties do not achieve this. Taken in conjunction with the structure of the aluminum industry they provide many opportunities for tax minimization and avoidance.[308]

The quotes allude to virtually all elements of the quandary facing the government's policy advisors in 1979-80. As indicated in chapter 2, there are essentially three ways of capturing a nonrenewable resource project's economic rent. The conventional remedy is to use the taxation system; in the resource area the prescription is frequently promulgated as a resource rent tax (RRT), sometimes known as a neutral tax or a rate-of-return tax.[309] Alternatively, the state may attempt to capture the surplus through government-owned corporations[310] or, if the primary objective is to ensure that the rents remain within the national boundaries, through the restriction of foreign ownership.

TABLE 22

Approximate Australian and Overseas Equity in Bauxite, Alumina and Aluminium Projects

Project/Location	Company	Australian Equity (percent)	Overseas Equity (percent)
Bauxite mines:			
Darling Ranges, W.A.	Alcoa	49	51
Weipa, Qld.	Comalco	27.5	72.5
Gove, N.T.	Nabalco	30	70
Darling Ranges, W.A.	Worsley Alumina	20	80
Alumina refineries:			
Pinjarra, W.A.			
Kwinana, W.A.	Alcoa	49	51
Gladstone, Qld.	Queensland Alumina	8	92
Gove, N.T.	Nabalco	30	70
Worsley, W.A.	Worsley Alumina	20	80
Aluminium smelters:			
Bell Bay, Tas.	Comalco[a]	27.5	72.5
Point Henry, Vic.			
Portland, Vic.	Alcoa	49	51
Lochinvar, N.S.W.	Lochinvar	35	65
Tomago, N.S.W.	Tomago	50	50
Kurri Kurri, N.S.W.	Alcan	30	70
Bundaberg, Qld.	Alcan (Canada)	[b]	[b]
Gladstone, Qld.	Gladstone	8[c]	92

Source: Australian, Senate Standing Committee on Natural Resources, *The Development* of the *Bauxite, Alumina and Aluminium Industries* (Canberra: Australian Government Publishing Service, 1981), p. 31.

[a] Excludes consideration of the Tasmanian government's preference shares in the subsidiary company which operates the smelter.

[b] Not yet determined.

[c] Based on initial shareholdings; Australian equity will increase later.

In the Australian setting of the late 1970s, public policy makers were largely precluded from suggesting greater reliance on the taxation and public ownership vehicles as a method of capturing economic rents. In the former case, the government had previously studied the feasibility of introducing a resource rent tax, especially as it related to the uranium and oil industries. This course of action was rejected by the then Prime Minister, Mr. Fraser, in July 1978, purportedly on the grounds that such taxes would discourage investment and thus be counterproductive to the nation's economic health. As time went on, the resource tax issue became extremely politicized, with the ALP recommending it as a 'cure-all' and the Lib/NCP vehemently rejecting it for the above stated investment disincentive reasons.[311,312] Hence, the RRT tool had to be dropped from the policy analysts' tool kit, despite concerns by Treasury officials:

> Taxation and royalty arrangements which, if excessively generous, can 'give away' much of the income benefit of resource development, particularly where it is *foreign owned and largely export-oriented.* Taxation arrangements for the mining industry already provide substantial incentives and further concessions (whether for specific projects or categories of activities) could substantially reduce the potential returns to Australians. Further concessions to the resource-based sector could also impose higher tax burdens on others – as it is, existing concessions mean that many companies are likely to be paying relatively little tax as the expansion in mining investment gets underway. The possibility of exceptionally large profits flowing from some resource projects (particularly in the energy area) suggests too that there could be pressures to *reconsider* the case for a properly designed *resource rent tax* on highly profitable projects.[313]

In a similar fashion, the public ownership vehicle was off limits to the policy analyst, since the Lib/NCP coalition forces were opposed to the public ownership instrument on ideological grounds. Indeed, given the high-profile use of this approach by Mr. Connor and Mr. Whitlam during the 1972-75 period, during which the Petroleum and Mineral Authority and the Pipeline Authority were established,[314] and the Australian Industry Development Corporation (a Crown corporation) vastly expanded,[315] it is not surprising that the Fraser government rejected the public ownership route.

Given that the RRT and public ownership instruments were not politically acceptable, the government moved to adopt tougher laws on foreign ownership; this was the only instrument remaining by which the Fraser regime could demonstrate that it was taking concrete action to ensure that Australians were the primary beneficiaries of the resources boom. The need for action in this area was clearly perceived by the Treasury, as evidenced by the following reference in an internal document:

> Continued public acceptance of foreign investment in Australia's natural resources, and hence the viability of the present foreign investment policy, will depend in part on the extent to which the benefits accrue (and are seen to accrue) to Australians.[316]

A further stimulus for adoption of more restrictive FDI/mineral sector policies was undoubtedly provided by the knowledge that a federal election was to be fought sometime in 1980.[317]

For these reasons, the Fraser government decided, in mid-1979, to adopt a more rigorous approach towards FDI in the mineral sector. Although all areas within the sector were affected, the coal and bauxite industries were the primary targets. The inclusion of coal is surprising in that the government had been rather zealous in enforcing the rules towards this industry since 1976. However, as illustrated in the Oaky Creek and Blair Athol cases,[318] it was deemed to be politically wise to be seen to be stringently applying the rules to the likes of Atlantic Richfield, CRA, Mount Isa Mining, and various Japanese utilities.

Perhaps another reason for treating the coal industry in this way was to direct attention away from the bauxite/alumina industry. In the latter area, the government faced a much more difficult situation: foreign ownership levels were unacceptably high but marketing and technology factors peculiar to the industry made it rather difficult for the government to adopt an inflexible position.[319]

Distributional Impact of the Mineral Sector Rules

The Fraser government's approach to the appropriation of benefits for Australians has generated some interesting distributional consequences. Indeed, one might suggest that it is primarily for this reason that the policy has been widely supported. More specifically, the Australian FDI/mineral sector regulatory scheme is essentially a tax levied on foreign investors. This occurs because the 50/50 rule normally forces foreigners who collectively own more than a 51-percent interest in a prospective property to divest themselves of assets before a project will receive development approval. Since the resulting sales can only be made to Australians, one would expect the selling price to be less than that receivable in an unconstrained market. Indeed, some foreign participants worry about the possibility of collusion among potential buyers which would drive the sale price down even more.[320] In either case, the foreign interest receives a lower return on investment than would occur if the FDI controls were not present; this result is equivalent to a tax on economic rent receivable by foreign interests.

The major beneficiaries of this policy are undoubtedly the domestic mining firms and financial houses and ultimately their shareholders. They are the recipients of the implicit tax levied on foreign investors since they can sell properties at a premium and buy them at a discount. In addition, given that the government has chosen to rely on FDI restrictions as a vehicle for ensuring that Australians are primary beneficiaries of the resources boom, there is less pressure on the government to introduce a resource rent tax. This policy would result in all mining firms, not just foreign participants, paying a rent-related impost over and above the existing corporate income tax and state royalty levies.

Interest Group Perceptions

One of the most remarkable features of the Australian foreign direct investment regulatory system is that it has evolved into essentially a bipartisan policy; indeed, this term is frequently used by speakers from disparate points of view. Nevertheless, disagreement and criticism obviously exist, although much of it is of a minor nature. Let us now turn to a discussion of the implicit and explicit positions of the various interest groups to the FIRB process and the overall foreign investment control system.

THE AUSTRALIAN LABOR PARTY

The Australian Labor Party (ALP) appears to accept implicitly a large part of the current FDI regulatory system.[321] This is not surprising since much of the present day regime owes its existence to the policies of the Whitlam government. In this regard, note that I have previously suggested that the policy framework announced on 24 September 1975 by the then Prime Minister Whitlam was largely adopted by the Fraser government; this is evidenced by the contents of the Treasurer's 1 April 1976 Ministerial statement. In addition, the rather severe international reaction to its FDI policies has probably led ALP party officials to be somewhat cautious of radical solutions in this policy field.

The above interpretation is quite consistent with recent ALP pronouncements on the subject. In its September 1980 paper on foreign investment,[322] issued one month before the general election of that year, obligatory attacks were made on the Fraser government for selling off the country's natural resource base, and on FIRB for being a welcoming committee for foreign investors rather than a rigorous screening agency. Nevertheless, the ALP policies, as advocated in the September 1980 document, are more noteworthy for their similarities to the Fraser regime than for their differences. In general, the ALP suggests that it will instruct FIRB to review proposals more thoroughly and that it will change the national interest test from 'not contrary to the national interest' to 'significant economic and social benefits to Australia'.[323] In addition, the ALP suggests that its 'objective is to have a majority Australian equity in all projects involving foreign investment'; however, exceptions would be granted if the national interest dictates. This recommendation was implicitly an expression of support for the Lib/NCP policy with respect to the mineral sector since it advocated extending the rules pertaining to minerals to *all* sectors.

The ALP's views on FDI in the mineral sector are essentially the same as those espoused by the former Fraser government. For instance, Labor wishes to see a 'significant degree of Australian involvement in mineral exploration' but it does not advocate a mandatory participation program. Two minor differences are promulgated. First, the increasing tendency towards customer equity is questioned; indeed, it is stated that the ALP would 'restrict customer equity to less than a controlling interest'.[324] However, it is quite clear, as evidenced by FIRB's 1981 annual report, that this is also a concern to the present government, although they have not gone so far as to adopt special rules for this type of equity. The second difference is, as expected, in the uranium field. Here, largely for reasons of intra-party politics, the 75 percent domestic ownership rule is accepted for all discoveries made prior to 1977 (this covers virtually all of the major known finds) and 100 percent for discoveries made thereafter.[325]

Before leaving the subject of ALP policies, it should be stated that the party has consistently advocated the introduction of a resource rent tax and a greater degree of public ownership in the mineral sector. In other words, it wishes to use all three instruments to capture rents. This suggests that, although there are minor differences between the ALP and the Lib/NC parties with respect to FDI, the overall impact of the recent change in government on the mining industry will likely be significant. In other words, ALP policies would apply to domestic and foreign firms in a more uniform manner; this is in contrast to the present-day scheme which places more of the burden on foreign-owned entities.

The ALP, in its May 1982 position paper on mineral production,[326] essentially reiterated the above points. Perhaps the major distinction is the strong advocacy of utilizing the resource industry to stimulate the manufacturing sectors. According to this document, foreign mining firms will be encouraged to maximize local purchases of equipment and materials. Followers of FIRA will see the similarities of these policies to the current Canadian approach and recognize the potential pitfalls that underly the recommendations.

THE MINING INDUSTRY

Based on the Australian Mining Industry Council's (AMIC) *Policy 82* document,[327] it is clear that the present day scheme is, by and large, strongly supported. This, of course, is not surprising given the predisposition of many of the mining industry's senior executives towards the policies of the Liberal Party. In addition, the tumultuous years of the Whitlam regime were not looked on kindly by the miners; in general, they perceived themselves to be bearing the brunt of a program of harrassment. Nevertheless, the degree of support for the current policies on FDI is beyond what one might expect based on blind ideological allegiance.

In its 1982 policy statement, AMIC draws attention to the bipartisan nature of the current policy framework: 'The policies of the major political parties on foreign investment have become much closer in recent years and, in important respects, a partisan policy now prevails.'[328] The essence of the current FDI/mineral sector policy, the 50/50 rule, receives strong support from AMIC:

> The requirements in the guidelines that local investors be given an opportunity of taking up the equivalent of at least 50 percent of the equity in new mining projects and the maximum practicable equity in mineral processing projects are reasonable. The industry also welcomes the provision in the national interest in special circumstances.[329]

However, AMIC is critical of the policy of treating the uranium mining industry differently than all other mineral activities:

> The present policy applies one set of rules to uranium and other rules to all other minerals. Since different minerals are often extracted from a single orebody, and all minerals are subject to Government controls, there should not be any differences in the rules to be applied to various categories of minerals.[330]

Despite the objections, it is my observation that neither AMIC nor its member firms really expected the Fraser government to alter its stance on the uranium sector. That is, as long as uranium remained a policy issue from an environmental and moral perspective, no further relaxation of the rules would occur.

Indeed, one may speculate that AMIC was aware that the government benefited from the industry's call for change. By resisting, the former government gained a measure of respectability from anti-mining groups. In return, it may have been more sympathetic to the views of the industry in other areas such as taxation.

THE DOMESTIC MINING INDUSTRY

As discussed previously, the domestic mining industry is among the major beneficiaries of the current scheme. The policy has resulted in an environment that continues to be attractive to foreign investors, as evidenced by FDI flows since 1976, but one which leads the domestic mining firms to be the recipients of the benefits generated by the constraints. Briefly, if foreign interests own more than 50 percent of a property, they must sell part of their interest so that they own, after the fact, no more than 50 percent interest in the development phase. Since such sales can be made only to Australians, it is expected that the selling price will be somewhat below that forthcoming from an unconstrained environment. Obviously, the Australian investor is the beneficiary of this regulation. Similarly, Australian firms gain if they wish to sell part of their properties. Since foreign firms cannot establish a position of greater than 50 percent interest on their own, they may be more inclined to enter joint ventures than otherwise. This facilitates Australian control or joint-venture control of projects that would otherwise fall into foreign hands. In summary, the FDI rules increase the likelihood that domestic firms remain in a controlling position and yet are able to see the property developed. In this instance, the economic nationalist gains psychic pleasure and the domestic firm may gain increased income and wealth.

Although the focal point of the discussion is the domestic mining company, it should be stressed that as a result of the Fraser government's FDI policy, and in particular its 50/50 rule, Australian financial institutions have become rather active in taking up equity positions in resource projects. In particular, insurance companies and pension funds have benefited from the current system, with the result that the average Australian now has a chance to participate in the wealth-generating activities of the country. Support for this view is provided by the Treasury:

> A recent development which should increase the capacity of the domestic capital market to provide equity for investment in resource projects is the increasing willingness of major Australian institutional investors to take up equity in these projects. Insurance offices and pension funds, which have been acquiring increased equity in the resource sectors over a number of years through net purchases of shares in listed companies, have been, in recent times, showing greater interest in participating directly as venturers in resource projects.[331]

Although direct equity participation by financial houses was desired by the Fraser government, it generated two relatively minor external diseconomies. First, the increased competition for project equity allows the foreign firm to receive a higher price for its assets; this facilitates the transfer of a project's rent to non-Australian sources. Secondly, financial institutions tend to take a small proportion of the equity, frequently 5 to 15 percent. In doing so, they facilitate diffusion of the Australian equity holdings and thus increase the likelihood that foreign interests will remain in effective control of the project. The probability of such an outcome is further enhanced by the tendency of financial houses to be passive holders of equity. However, if ownership is the dominant government objective, as appears to be the case, then the above concerns are largely irrelevant.

Although spokesmen for the mining industry have generally been rather quiet on FDI policy since, say, 1975, there has been one notable exception: Mr. Gordon Jackson, Chief Executive Officer of CSR. For instance, when the Fraser regime instituted its naturalization program, Jackson openly questioned the wisdom of the policy. As reported by Bambrick:

> Jackson drew attention to the fact that the new guidelines said nothing about prices or terms of issues under which naturalising companies were to raise their equity in Australia, details fundamental to the sharing of benefit between foreigners and Australians.
>
> Attention was also drawn to a major concern of Australian companies, that the new guidelines would permit a flood of foreign takeovers of smaller and weaker Australian-owned resource companies. That concern was heightened by the apparent reliance on expectation rather than requirement that naturalisation was to be accomplished by new issues rather than by takeovers.[332]

In a more positive light, Jackson has put his stamp of approval on the Fraser government's more zealous approach towards monitoring FDI in the mineral sector. For instance, he states:

> The control of foreign investment is a matter on which Australians have a clear, long-standing and firmly-held opinion, cutting across political parties. Quite simply I believe that as a society, Australians want, will want, and should have control and maximum possible ownership of their resources.[333]

Although the executives of such firms as BHP, Western Mining Corporation, Electrolytic Zinc and Peko-Wallsend remain largely silent on the issue, hearsay evidence suggests that they too generally support the guidelines. Indeed, one might be surprised if they did not, given the nature of the scheme.

FOREIGN INTERESTS

Foreign interests, defined broadly to include both corporate and government entities, appear to be reasonably satisfied with the present-day FDI regulatory regime. Undoubtedly they would prefer a regime without controls to one with restrictions, everything else being equal, but it is this very qualification that tends to generate Australian support for the post-1976 regulatory regime.

As suggested previously, it appears that foreign investors readily accepted the Fraser government's argument that its FDI control system was as weak as possible, if the issue is to remain a bipartisan policy. In other words, as the Vernon Committee implied,[334] given the average Australian's predisposition towards a mild degree of economic and political nationalism, it is necessary to regulate FDI in one manner or another. Most investors, with the possible exception of U.S.-based entities, can readily appreciate this argument since they reside in domains with similar views on the role of FDI.

Therefore, it is not the principle of restrictions *per se* that is the critical factor in forming foreign attitudes, it is the specifics of the regulatory regime. Hence, the Australian administrative structure with its reliance on relatively clear-cut rules, rapid decision making, stability in the rules, forward orientation, and the utilization of a transition mechanism to facilitate movement from foreign to domestic status, generally appears to meet the needs of foreign investors. Undoubtedly, these perceptions have been largely shaped by the adverse publicity associated with the Connor/Whitlam experience of 1972-75.

Political Stance of the Fraser Government

Probably the most important factor in contributing to the success of the present-day policy was the active salesmanship of the policy by the Prime Minister, the Treasurer, and the Minister of Trade and Resources. They continually outlined the beneficial role played by FDI in Australia's historical development. Nevertheless, according to observers, they suggested to interested parties that the current political climate was such that FDI had to be subjected to certain rules and regulations. The restrictions were said to be promulgated as being in everyone's best interests since without them political pressures could arise that the government might not be able to resist: worse yet, they could contribute to a change in government that might institute less favourable FDI policies.[335]

Although the above scenario represents my interpretation of events, I believe it properly accounts for the Fraser government's strategy and much of its apparent success. However, even the proponents of the system do not suggest that it is perfect. Although they may reject some of the criticism previously presented in this chapter, it appears as if FIRB, the FID of the Treasury and other senior officials perceive the need for certain changes.

Possible Changes to the Guidelines

Based on a review of recent reports by FIRB, speeches by the former Treasurer, and interviews conducted by the author, it would appear that the Fraser government had three basic concerns about its foreign investment guidelines. They may be denoted as the 'point of impact', customer equity, and transfer pricing issues. I shall now address each point in turn.

The issue of when the 50/50 rule should take effect is of critical importance in determining the proportion of the economic rent that will be captured by Australians. The concern can perhaps best be seen if we view the mineral development cycle as a continuum: at one end is the exploration lease stage and at the other a depleted orebody. In between we have the discovery, delineation, construction and extraction stages. From a planner's perspective, especially in an environment characterized by the absence of an effective resource rent tax.[336] the critical decision is one of deciding when to unleash the 50/50 rule upon the foreign investor in order to be able to capture the maximum rent for Australians. Essentially the problem is one of riskiness, from the perspective of both a project and an individual investor. That is, what is the risk associated with each stage of the process and what, on average, is the Australian financial community's attitude towards risk?

From a project perspective, the risk is greatest at the exploration stage; it tends to decline as one moves across the continuum. Therefore, if the 50/50 rule is applied at the exploration stage, there will be a sharp reduction in such activity unless the Australian investors are willing to fill the vacuum. In addition, there could be technological reasons for not insisting on Australian equity at the exploration stage. For example, if indigenous technological skills are lacking, such as in offshore oil and gas drilling, the strict application of forced joint-venture agreements could lead to a rate of exploration that is below the socially desirable level. On the other hand, the latter argument does not apply with equal force to coal, base metal and uranium exploration. Given these potential problems, it remains to be answered why many policy planners favour an earlier introduction of the 50/50 rule.

The answer is simple: significant rent may be transferred to the foreign investor under this current regime. For example, if a 100-percent foreign-owned firm undertakes an exploration activity, makes a major discovery, and then moves the project through all phases up to the development approval stage, it will possess a valuable asset with a relatively low level of risk attached to it (especially if it has informally lined up long-term purchase contracts). If the 50/50 rule is applied at this stage, it merely sells 50 percent of its interest to a domestic entity. Theoretically, the acceptable price will be shaped by each participant's estimate of the project's economic rent. Given different attitudes towards risk, different perceptions of future price and cost behaviour, etc., there will not be a single net present value figure generated, but instead a broad band of estimates. The extent to which the rent is extracted depends upon the nature of the bargaining process which, in the Australian 50/50 case, is biased somewhat in favour of the domestic buyers by the exclusion of foreign competitors. Nevertheless, the opportunity exists for a significant proportion of the after-tax rent to be transferred at this point.

The problem is potentially more severe if foreign interests are given development approval subject to the condition that additional domestic equity be attained prior to the commencement of commercial production. A deferment of this sort often facilitates the acquisition of long-term purchase contracts and development financing. This normally leads to a higher selling price of the foreign interest and a further reduction in economic rents available for capture by Australians.[337]

The above analysis may explain the increasing tendency of FIRB to insist that domestic equity arrangements be satisfied prior to the granting of development approval. It also suggests the rationale for attempts to push the 50/50 rule back to an earlier stage in the mineral cycle. The Koongarra uranium mine situation is perhaps the best example of the problem faced by FIRB. The orebody was discovered by Noranda Mines of Canada; they in turn sold to another Canadian company, Denison. The latter company is attempting to obtain Aboriginal agreement; once this is done, they will be in a position to obtain development approval. However, to do so would normally require 75 percent or, at a minimum, 50 percent Australian equity. Otherwise Denison would be in a position of having to sell off part of the Koongarra property without being able to assure buyers that a market exists for the uranium (a major concern, given the current state of the yellowcake market). If, however, it could obtain approval contingent upon meeting the equity guidelines prior to the start-up of mining, it would have a more valuable package to offer investors. Although this is in Denison's best interest, it is not necessarily in Australia's, especially if its objective is to ensure that the maximum practicable rents remain within the country.

In fact, it would appear as if pressure has been applied by mining firms for this change to be made. This is evidenced by the reference in FIRB's *1981 Report* to a request by uranium producers to receive permission to enter into sales contracts for yellowcake prior to receipt of official development approval.[338] The review board indicated that it would explore the request and, in essence, appeared to be somewhat sympathetic. Indeed, in 1982, the government announced that Pancontinental Mines could proceed to enter into sales contracts for disposition of product from its Jabiluka mines prior to meeting its foreign ownership obligation. As a consequence, Getty Oil Company should be able to dispose of part of its holdings at a higher price than if permission had not been granted.[339]

The FIRB may also be concerned that a major oil strike will be made by a wholly or largely foreign-owned firm such as Shell or B.P.

Assuming that such a find were to be on-shore, there might be massive public displeasure with the required purchase price that Australians would have to pay to acquire, say, a 50-percent interest in an asset that many citizens believe is theirs to start with. Such concerns may have been behind the government's recent attempts to cajole Shell to float 25 percent of its shares to the Australian public.[340]

The Treasury appears to be subtly encouraging firms to take on Australian partners at an earlier stage than in the past. For instance, in January 1982 the Treasurer, Mr. Howard, stated:

> Under the present policy, foreign investors are not obliged to seek Australian participation in their exploration activities in Australia. Nevertheless, the Government wishes to see, to the extent practicable, a continuing and significant level of Australian involvement in exploration. Foreign interests are therefore encouraged to seek Australian participation in those projects that can reasonably be expected to proceed to the development stage. More generally, foreign investment policy welcomes the early introduction of Australian equity participation into national resource ventures.
>
> These features of the foreign investment policy will be continued. In this regard, I note that foreign investors are increasingly seeking out substantial Australian equity participation in their exploraton activities. There is also a high and growing level of involvement by Australian investors in the large number of natural resource projects at present at the exploration and pre-development stages.[341]

There may be other reasons for perceiving that the 50/50 rule should be introduced at an earlier stage in the mineral cycle. Perhaps the most important has been the rapid development and maturity of the Australian financial markets in recent years. The result, as FIRB stresses, has been an increase of the proportion of total exploration expenditures owned by Australian residents. For instance, in its *1981 Report*, FIRB states:

> At the same time, given the prospects for Australian resource development, many Australian investors, including industrial companies, institutions and private investors, as well as the traditional mining houses, are taking up the opportunities to undertake exploration investment.[342]

The board then proceeds to indicate that domestic equity now accounts for 40 percent of all exploration expenditure; in 1978 it was only 30 percent. Even more importantly, from the government's perspective, is the fact that 'Australian equity in high risk petroleum exploration ... would appear to be about 49 percent.'[343]

Another factor that gives the government increasing confidence in taking a more aggressive stance on exploration activity is the proven track record of Australian companies in the exploration field. Indeed, most of the major nonpetroleum mineral finds in the last 10-15 years have been made by domestic firms: examples of such finds are Ranger, Jaliluka, Nabarlek, and Roxby Downs. In addition, the focal point of the resources boom has been the black coal sector. Significant coal reserves have been identified, often through federal or state agencies, and hence high-risk foreign exploration funds are not essential for future development of this industry.

All of these factors suggest that a movement of the 50/50 rule back to or near the exploration stage might meet with some success. However, such a policy is much more likely to succeed if it is applied only to a subset of minerals such as coal and uranium, or if differential equity ratios are employed between mineral categories. Alternatively, one could institute a requirement for a lower level of Australian equity participation at the exploration stage than that now required at the development stage. Although there were signs in 1981 and early 1982 that FIRB and the Treasury wished to see the mineral sector rules apply at an earlier stage in some instances, the current recession will probably defer, if not cancel, such plans. It is much easier to introduce restrictions in a strong market than in a depressed one.

It is probably apparent to the reader that many of the concerns discussed above could be handled through a properly designed resource rent tax.[344] However, this approach ignores the political environment of the policy maker, and the fact that it is extremely difficult to design such levies.

CUSTOMER EQUITY

The FIRB also appears to be exhibiting increasing concern over the steadily growing phenomenon of customer equity: the purchase by end-users of an equity position in a project. From a purchaser's perspective, the acceptance of an equity position reduces the degree of risk associated with long-term agreements.[345] During the mid and late 1970s, such contracts became less attractive to all concerned, due to rapidly rising prices associated with the energy crisis and the impact of inflation on production costs. Consequently, many long-term agreements were breached by either the buyer or the seller. To some extent, the assumption of an equity position provides the purchaser with additional protection: for instance, if higher prices must be paid, part of it may be recouped by way of the purchaser's share of the suppliers' increased profits.

The customer equity issue creates difficulties for the federal government since it exhibits both positive and negative attributes. The major advantage is, of course, a virtually guaranteed market. This becomes quite important during periods of depressed economic activity, since one might expect customer-owned mines to be less affected than independent entities. On the other hand, since customer equity often entitles the purchaser to a seat on the board of directors, it provides access to detailed cost data; this, in turn, may facilitate the transfer of rents to the customer. The counter argument is that iron and coal purchasers, especially the Japanese, already possess detailed knowledge of most Australian mines; hence, customer equity is not as serious a problem as suggested above, as long as the level of participation is constrained to a non-controlling interest. According to this view, such a restriction would largely negate the possibility for transfer pricing activities since the majority shareholders can be expected to protect their own interests and hence those of the community as well.

Given current FIRB guidelines, controlling interest presumably exists if 15 percent of the voting shares are held by a single foreign interest, or if 40 percent of the voting stock are held, in total, by foreign interests. Although the solution described above is quite similar to that advocated by the Australian Labor Party,[346] it does not appear to be far removed from FIRB's views on the subject. Indeed, casual empiricism suggests that the Japanese in particular tend to seek a 15- to 30-percent equity position; hence a restriction of the above type may be unnecessary in most instances, with the exception of the bauxite/alumina industry. Traditionally, this vertically integrated industry has been the focus of concern by bauxite producing nations.[347] Given the absence of an arm's-length reference point, it is natural that host countries become suspicious of the potential for transfer pricing activities that work to their detriment. If such a situation is perceived to exist in Australia, and if, as many observers suggest, the tax mechanism is deemed to be incapable of stopping the practice,[348] then there is a strong argument for FDI controls. By insisting on at least a substantial domestic ownership level, added protection is afforded to the Australian public as long as Australian shareholders pursue profit maximization strategies. Indeed FIRB's activities since 1980 suggest that it is following, as best as it can, this course of action at both the extraction and smelter stage.

Summary

The Australian foreign direct investment policy appears to have been remarkably successful in the mineral sector. It has become essentially a bipartisan policy; it is generally accepted by the domestic mining industry; and it is tolerated by external interests. Indeed, it appears as if strict application of the 50/50 rule since late 1979 has not deterred FDI or economic development.[349] On the other hand, the Foreign Takeovers Act and the guidelines ensure that a significant proportion of the net benefits, and in particular economic rents, will be captured by Australians. In addition, as McKern has shown, the proportion of foreign ownership in the mineral sector will undoubtedly fall over time from a high of 60 percent in 1975 to substantially less than 50 percent.[350]

It should be stressed that not all Australians agree that the Fraser government's FDI policies are a success. However, given the minor differences in the stated positions of the major political parties, it is apparent that the present policy represents a rough consensus on the overall issue. In fact, it would appear that the mineral sector rules are the most widely accepted part of the policy.[351] In contrast, it is the manufacturing and the resource processing sectors which appear to be the target of the Hawke government's campaign to 'toughen' Australia's FDI regulatory regime.[352] This supports the proposition that, the greater the degree of clarity in the evaluation criteria, the greater the degree of public and investor acceptance.

In the following chapter I shall attempt to compare and contrast the Australian and Canadian approaches toward FDI in the mineral sector. This will provide the foundation for the concluding chapter wherein I will outline those aspects of the Australian system that I believe should be considered for adoption in Canada.

7. A Comparison of the Canadian and Australian Regulatory Systems

Introduction

In the preceding chapters I attempted to outline the nature of the foreign investment regulatory regimes in both Canada and Australia, with particular emphasis on the subset of policies that pertain to the nonpetroleum mineral sector. In this chapter I shall discuss the relative merits of the two systems.[353] In doing so, special attention is devoted to those factors which might account for the apparent successs of the Australian scheme *vis-à-vis* its Canadian counterpart.[354]

Similarities: FDI Controls in Australia and Canada

Australia and Canada both employ a general screening system which relies upon a national benefits test to determine if individual investment projects are to receive government approval. The criteria used in the evaluation process are surprisingly similar; this may be uncharitably rephrased as equally nebulous. Each domain reviews all foreign takeovers of existing enterprises; this applies regardless of the nationality of the previous owner. In addition, new business ventures are also subject to FIRA and FIRB scrutiny; this category includes expansions by existing foreign controlled firms into so-called unrelated business areas. Within the mineral sector, each review agency has been given a mandate (explicitly so in Australia and only implicity in Canada) to ensure that new resource projects are at least 50 percent domestically owned. However, there are many more differences than similarities.

Differences: FDI Controls in Australia and Canada

TIME LIMITS FOR DECISION MAKING

One of the major complaints against FIRA has been the length of time required, on average, for decision making. Hence, it is important to stress the differences in this regard between the Canadian and Australian systems. In Canada, the Foreign Investment Review Act stipulates that the government has 60 days in which to make a decision; otherwise the proposal is deemed to be accepted. However, in order to provide some degree of flexibility, the act allows the minister responsible for FIRA to issue an order requesting more information; this essentially 'stops the clock' and allows an unspecified amount of time to complete the review.

Although this provision of the act was designed to facilitate the treatment of unusual cases, it has become the norm rather than the exception for those applications subject to the standard review process. However, rather than blaming FIRA, the minister responsible, or Cabinet for inefficiency *per se*, it is more productive to focus on the inadequacies of the decision-making framework. In other words, a system based primarily on a bargaining process is, by definition, relatively time consuming. In fact, given the continued reliance upon such a decision process, strict enforcement of the 60-day limit would bias the negotiating process in favour of the applicant.[355] This could become a problem if it were known that the government was under political pressure to keep the rejection rate to a rather low level. Hence, blind allegiance to the 60-day limit, without fundamental changes to the decision-making process, could severely weaken the credibility of the system.

The Australian approach is interesting in this regard, but has less policy relevance to Canada than might first appear to be the case. The Treasurer, with respect to takeovers, has 30 days in which to make an initial decision; this can be readily extended by a further 90 days. At the end of 120 days, a final decision must be made. For new business applications, the government has set an administrative deadline of 90 days.

The Australian fixed-date system works for two reasons. First, FIRB and the Treasurer have twice as much time in which to make takeover decisions. Second, in the major policy areas, the Australians either utilize relatively fixed rules or focus on only one or two items for bargaining purposes. In addition, resubmissions are, in some instances, encouraged. Hence, the success of the Australian system is not due to the absolute time limit *per se*; instead, it is attributable to fundamental differences in the decision-making framework. Let us now explore some of these factors.

BENEFITS TEST

Both the Australian and the Canadian schemes require all reviewable proposals to pass a benefits test prior to attaining approval. In the former case, all submissions must be found to be 'not contrary to the national interest'. This is, theoretically, a weaker requirement than the

Canadian stipulation which requires proposals to display 'significant benefits' for Canada.

In practice, there may not be a major difference in the actual test employed, at least with respect to the majority of cases assessed.[356] As Schultz *et al.*[357] suggest, FIRA in essence utilizes a 'not contrary to the national interest' test when assessing short-form applications; these now constitute approximately 85 percent of FIRA's caseload. Even in the takeover area, one suspects that the 'significant benefits' test may not always be used. This is primarily due to the difficulties inherent in measuring the socioeconomic impact of takeovers. As noted in chapter 2, many of the attributes are intangibles: for example, cultural and national sovereignty impacts, and the rate of technological diffusion. These items virtually defy quantification. Even the purported tangible factors are difficult to measure since future outcomes are uncertain. Hence, any benefit test is bound to be rather imprecise.

The Australian approach, in the mineral sector, is virtually to ignore the national benefits test associated with the general screening mechanism. Instead, it relies on a sector-specific quantifiable test. Let us now investigate the properties of such a mechanism.

SPECIAL AND RESTRICTED AREAS

Both nations employ a restricted-sector approach. Within such areas as the media and financial institutions, foreign investment is effectively restricted or precluded. However, within the general screening system, Australia has designated areas wherein sector-specific rules apply; these sectors are designated as 'special areas'. Two of these are 'uranium' and 'other mining'.

In the nonuranium mining sector, projects are expected to exhibit 50 percent Australian ownership and 50 percent Australian citizen membership on the board of directors at the time the project is approved. In extenuating circumstances, approval may be given subject to attainment of the 50/50 rule after approval but at some point prior to the commencement of commercial production. In rather unusual circumstances (no such cases since 1979), approval may be given without either of the above conditions being met. In this situation, the proposal presumably has been deemed to bring with it significant benefits to Australia. The requirements for uranium are somewhat more rigid: 75 percent domestic ownership, or in extenuating circumstances 50 percent may be acceptable but only if the venture is judged to generate 'significant economic benefits'.[358] Approval will not be given under any circumstance to projects exhibiting less than 50 percent Australian equity. In summary, in Australia, all mining projects are expected to pass two tests: the 'not contrary to the national interest' criterion and the sector specific rules. In practice, the latter dominates, and thus foreign investors face a relatively precise set of rules in the mineral sector.

Although the Canadian general screening system does not explicitly recognize special sectors, it does allow decision makers to take into account 'the compatibility of the acquisition or establishment with national industrial and economic policies.'[359] In this way uranium, oil and gas, and to a lesser extent other mining activities, have been granted, *de facto*, special status. Unfortunately, the decision criteria remain imprecise, the policy directives vague, and the relationship between the *de facto* special areas and the general screening criteria nebulous.

Canadian treatment of uranium mining is somewhat akin to the Australian model. As described in chapter 3, uranium mining has been a restricted sector since 1970. The policy requires 67 percent Canadian ownership of all new mines, although a 50-percent level is possible under the ubiquitous extenuating circumstances clause. Although the policy has not been promulgated in legislation or in regulations, it is widely accepted as a firm government position. Equally important, FIRA has widely advertised the existence of the policy and has let it be known that the special rules must be met in order to obtain FDI approval. Given the power of the government's export permit system with respect to uranium and other legislative vehicles, even those projects not subject to FIRA review (expansions by existing foreign-owned uranium operators) must comply with the policy. For those subject to FIRA review, it is not intuitively obvious that the 'significant benefits' test also applies. Nevertheless, it is interesting that the only Canadian experience with an Australian-style special area has been remarkably successful. Foreign investors have not attacked the system vociferously; the industry expanded rapidly in the 1970s, and its current malaise is related not to lack of investment but to external market conditions.

Since 1980 the oil and gas area has been a *de facto* special sector. Nevertheless, the mandate given to FIRA is rather imprecise, especially with respect to developments on provincial lands. The general target of 50 percent Canadian ownership of the sector by 1990 is an industry-wide objective, not a project-specific target. Although FIRA has been instructed that the government does not wish to see proven reserves sold to foreign interests, grass-roots development on provincial lands is apparently subject only to the general 'significant benefits' test.[360]

Even the nonuranium, nonpetroleum mineral sector has acquired special status through the Prime Minister's 1974 speech in which he indicated that it is the government's desire to see that all new resource projects are at least 50 percent and preferably 60 percent Canadian owned. However, as noted previously, FIRA has never been publicly instructed to treat this statement as government policy for FDI review purposes. Hearsay evidence suggests that since 1980 FIRA has tried to apply the mandate to new petroleum and coal projects which fall under its perview. Evidence in the nonenergy area is spotty, but it appears as if the 50/60 percent target has sometimes been sought here as well.

In summary, the Australian system in the mineral sector is almost totally divorced from the general screening process. The Canadian approach is a hybrid; certain elements of distinctiveness exist, but they are intertwined with a general screening mechanism. Equally interesting is the fact that in Australia all new mineral projects are subject to review, whereas in Canada many escape the net. Let us now delve into this important issue.

FOCAL POINT OF REVIEW PROCESS: THE PROJECT OR THE CORPORATION

The Australian FDI/mineral-sector decision framework utilizes the individual resource project as the basis of evaluation. This allows the government to control the level and nature of FDI in all new mineral projects. In this way, all foreign interests are treated alike, policies characterized by retroactivity can be avoided, and yet the government can demonstrate tangible success as perceived by most economic nationalists.

In Canada, FIRA and the responsible minister face a different situation. On the one hand, the FIR Act designates the business enterprise, not the project, as the focal point of the review process. Indeed, once a business enterprise is granted permission to carry out certain activities, it may expand its operations in the approved or related areas without ever again being subject to the review process. Given the prevailing level of foreign investment in oil and gas, coal, and to a lesser extent nonenergy mineral industries, the potential exists for a significant amount of nonreviewable foreign expansion. On the other hand, FIRA has a mandate, as part of a Cabinet-level policy, to try to ensure that all new major resource projects are at least 50 percent and preferably 60 percent Canadian owned. It is thus apparent that FIRA finds itself in a quandary.

The agency has responded in a manner which can be described as either ingenious or inappropriate, depending upon the reader's view of the world. Since 1980 FIRA is said to have attempted, in a number of situations, to extract written promises (undertakings) from applicants to ensure that a given level of Canadian ownership will be attained, not only in the proposal under review but in all future projects undertaken by the applicant. In this way, FIRA has been able to expand its net so as to be able to better implement the 50/60 percent target. However, the cost of the strategy, in the form of investor alienation, has purportedly been high. As expected, many investors believe that FIRA has overstepped its mandate. Equally infuriating to some applicants is that new entrants are, in essence, subject to an Australian-style system, while the old established foreign enterprise can continue to expand within its traditional area of activity without scrutiny. Unfortunately for the federal government, FIRA's zealousness often brings political problems. For example, those subjected to the undertakings with respect to future activities are unhappy, while the economic nationalists are generally unaware of the attempts to satisfy their aspirations.

FIXED-RULE VERSUS BARGAINING SCHEMES

As previously stated, mineral projects in Australia need only, in practice, meet the special-area rules in order to gain approval. In theory, they must also pass the 'not contrary to the national interest test', but this criterion appears be applied only if the project is unable to meet the key-sector rules, and this has occurred infrequently in recent years.

In contrast, the Canadian approach in the mineral area is to require all applicants wishing to establish a new business enterprise to meet the 'significant benefits' test. This involves satisfying a host of nebulous criteria. Although the mineral sector appears to have evolved into a *de facto* special sector over time, the 50/60-percent rule is not applied consistently. Even where it is applied, the applicant has also been required to engage in a bargaining process.[361] Problems with the bargaining process result from the fact that it is: time consuming; alienating to the investor; a source of suspicion on the part of both the investor and the general community, since there are no published norms in order to facilitate 'fairness' comparisons; and characterized by an excessive amount of uncertainty in the business decision-making process.

Although this approach has some merit in the manufacturing sector, it exhibits few advantages as an FDI regulatory device for the mineral sector.[362] In this sector, a fixed-rule system, combined with other conditions which apply to all firms regardless of nationality of ownership, is better suited for simultaneously appropriating significant benefits for Canadians and stimulating economic development.

NATURALIZATION PROCESS

A unique feature of the Australian system is the employment of a special transitional device by which well established foreign-owned firms are able to receive prior credit for Australian majority ownership if they publicly pledge to move towards this objective over time. Such entities, known as naturalizing firms, are able to undertake certain types of projects without being subject to review;[363] thus the previous statement that all new mine projects are reviewable is not technically correct. In practice, however, it remains a valid statement since only two mining firms, CRA Ltd. and Ashton Mining NL, have been granted naturalizing status and only a few projects have been affected by the policy since it was enacted in late 1978. The program has helped reduce external opposition to the strict application of the 50/50 rule. It also gives Australians the opportunity to become majority shareholders in a number of important corporations. In order to minimize the relatively unproductive 'buy back the farm' aspects of the policy, naturalizing firms are expected to move towards the 51-percent domestic equity target by new share offerings related to corporate expansions.

There is no Canadian counterpart to this scheme; indeed, it is unnecessary, since all such firms are exempt from review as long as they stay within their existing lines of business. Nevertheless, any attempt to enforce the Cabinet's 50/60 percent Canadian ownership objective in all new resource projects should perhaps be tempered by a naturalization scheme of the Australian variety.

PUBLIC RELATIONS STRATEGY

A striking dissimilarity between the two schemes is found in the manner in which they have been promulgated to the business community. Although this amounts to a study of form as opposed to substance, it is nevertheless important in the world of perceptions and hence politics.

In Australia, senior politicians have actively courted foreign investors; at the same time they have carefully indicated that certain conditions must be met. With respect to the mineral sector, the 50/50 rule is presented to investors as the minimum constraint that is consistent with keeping FDI as a bipartisan policy. In other words, the participants know the rules of the game; if they do not, FIRB officials quickly inform them of the government's current position.

In contrast, the Canadian scene has been characterized as an environment that is increasingly unreceptive to foreign investment. To some extent, this appears to have been a case of investor ignorance, 'bad press',[364] and lack of effort on the part of the government to explain the nature of the current FDI regulatory system. Admittedly, since mid-1982 there has been a concerted effort on the part of the ministers responsible for FIRA, Finance, and Energy, Mines and Resources to explain the nature of the Canadian system to the international financial community.[365] Even the Prime Minister has started to do the same.[366] However, their Australian counterparts, throughout the tenure of the Fraser government, have zealously carried out these activities.

In fairness, it should be stated that the Canadian Cabinet and senior government officials face a more difficult challenge. This is primarily attributable to two factors: first, the open-ended nature of the FIRA decision-making system makes it difficult to state in plain language the terms and conditions under which Canada welcomes FDI. Second, the fact that the current system was advocated and developed by a Liberal government, and that this same group advocated a more restrictive scheme in 1980, makes it somewhat more difficult for advocates to dismiss the past as irrelevant. In Australia, the Fraser government never ceased to draw the contrast between its scheme and the chaotic state of affairs that existed throughout 1973-74. They conveniently failed to mention that their present scheme was essentially the same as that eventually formulated by the ALP a few months prior to their loss of power in December 1975.

Before leaving this section, one additional cosmetic factor should be noted. Investor perceptions of the bureaucracies that they encountered in the FDI regulatory process are important in shaping overall opinion of the restraint program. The Fraser government recognized this phenomenon as part of their initial FDI policy framework. In response they set up a group, the Foreign Investment Review Board (FIRB), to advise the Treasurer. As previously noted, the board consists of three members, two of whom (including the chairman) are retired businessmen. The third doubles as the head of the related bureaucracy, the Foreign Investment Division (FID) in the Treasury. The board helped create the impression that business values are taken into account in the decision-making and policy formulation process. In addition, the public servants involved in the review are members of the Treasury — a well respected market-oriented group, widely perceived to be the elite of the Australian public service.

The Canadian situation is distinctly different. There is no organization equivalent to FIRB; the administrative agency (FIRA) reports directly to the Minister. Although FIRA employs more MBAS and lawyers than does FIRB, this does not appear to have led investors to the conclusion that commercial criteria are given appropriate weighting. FIRA is widely viewed as a bureaucratic nightmare; for example, the U.S. Ambassador to Canada was recently quoted as follows:

> Robinson blamed a 'bureaucracy gone wild' for the Foreign Investment Review Agency which had a strong nationalistic bent. 'The civil servants became a law unto themselves and Parliament must get them back on track.'[367]

The position taken in this monograph is that such allegations are largely misplaced: FIRA is forced by the nature of its mandate to rely on a bureaucratic, time-consuming bargaining process. In addition, FIRA has never been part of a well-established market-oriented prestigious organization, as has its Australian counterpart. Hence, it has to fight its own battles, saddled with a set of rules that by their very nature generate hostility.

In summary, the Canadian scheme has performed poorly in the public relations realm; this has, in part, accounted for its dismal international image.

FOCAL POINT OF FDI POLICY DEVELOPMENT

As discussed in chapter 4, the mineral industry was the focus of the Whitlam government's FDI policy formulation process. As a consequence of the severe reaction by foreign interests to the lack of precision in the rules, the government gradually moved to a fixed-rule system. They found that only through this mechanism could they simultaneously reduce corporate uncertainty and ensure that a substantial proportion of net benefits would be captured by Australians. This suggests that they decided to focus on the issue of ownership as opposed to control. That is, the mechanism employed attempts, among other things, to capture economic rents, control transfer pricing, and develop the domestic capital markets; it does little to affect the location of corporate control. Also noteworthy is the fact that the manufacturing industry continues to be effectively subject to a Canadian-style bargaining system. The evidence suggests that this area has not been a priority area with respect to FDI policy; this is substantiated, in part, by the 95-percent-plus acceptance rate of investment proposals in this area.

The Canadian preoccupation with the manufacturing sector in the 1960s and early 1970s left the country ill-equipped to cope with the FDI aspects of the energy and resource developments of the post-OPEC era. A bargaining process is perhaps suited to FDI regulation in the manufacturing sector, but it is both unnecessary and self-defeating in the resource area. This statement is based on the following factors: minerals are normally exported; mining projects are characterized by a low import propensity relative to sales value in the operating phase; mining is not protected by a tariff and hence does not suffer from most of the truncation-related problems; and mining is a field within which Canada generally possesses world class technological and managerial skills. Therefore, with the exception of the further processing argument, the economic-rent/transfer-pricing/economic-patriotism issues are the major problems associated with FDI in the mineral sector. These factors can be more readily addressed by a mechanistic fixed-rule system, although different parameter values may be appropriate for different subsectors of the industry.

DIFFERENCES IN ACCEPTANCE RATES

One notable difference between the two domains is the rather large discrepancy in acceptance rates. Before proceeding, it should be stated that this statistic is symptomatic of other factors, many of which have been discussed above. Although, overall, the Australian system has been characterized by acceptance rates of approximately 95 percent, whereas the corresponding Canadian average is roughly 80 percent, it does not automatically follow that the Canadian scheme is more rigorous than its Australian counterpart. First of all, a significant number of FIRB applications are routine real estate transactions which tend to have a high acceptance rate. Secondly, on the basis of casual empiricism, it would appear that FIRB is much less zealous in attempting to bargain benefits from manufacturing and service related firms than its Canadian counterpart. But in the area of interest to this study, the data are clearly misleading.

It was noted in chapters 3 and 6 that FIRA, especially during the period 1980 to 1982, was rather aggressive in reviewing mineral-related proposals, when only about half of all applications were approved. Prior to that time, the average was in the order of 75 percent. This suggests that many investment opportunities were lost to Canada; nevertheless, many projects were approved that left foreign interests in a dominant ownership position. Since mid-1982, the acceptance rates have moved back to their historical average. In Australia, the acceptance rate in the mineral sector is close to 100 percent (unconditional and conditional acceptances), yet *all new* resource projects initiated since mid-1979 exhibit at least 50 percent Australian equity at the time of approval, or will do so prior to the commencement of commercial production. Most decisions fall into the former category. Although factors other than FDI policy were at work, the Australian mineral sector, up to 1982, was clearly more buoyant and dynamic than its Canadian counterpart.

Admittedly, given the paucity of publicly released data, one cannot say with precision whether the FIRA bargaining process generates more benefits for Canadians than the Australian system. However, the Australian fixed-rule system has led to relative investor harmony, domestic political support, and a large degree of Australian ownership, including stimulation of direct participation by financial houses and pension funds.

In contrast, the Canadian scheme has generated little praise for its perpetrators, and a large amount of international ill-will, despite allowing approximately 80 to 90 percent of FDI to escape the review process.[368]

In summary, the differential acceptance rates with respect to the mineral sector means little in determining the relative severity of the control regimes, since the rules of the game are distinctly different.

OTHER FACTORS

To this point, I have discussed the major policy issues that I believe explain most of the differences in the relative performance of the FDI/mineral sector regimes in Canada and Australia. However, several other factors are worthy of brief mention.[369]

The nature of the interdepartmental consultation process does not appear to be a major factor in the overall FDI/mineral sector debate. In both countries, all mineral-related proposals are vetted by the applicable line departments. In addition, central agencies are consulted, as are other departments deemed to be affected by the individual application. The extent to which this advice is accepted, if it differs from the review agency's own preliminary decision, is unknown: it obviously depends, among other things, on the power and prestige of the ministers and officials involved. In the Australian case, the aggressive role played by the former Deputy Prime Minister and Minister for Trade and Resources, the Hon. Doug Anthony, suggests that this department's view probably carried more weight than does, say, the opinion of Energy, Mines and Resources Canada.

The reverse situation probably holds for the role of state governments. In Canada, given its history of federal/provincial conflict, formal consultations are held with the appropriate provincial authorities; although this is also done in Australia, the views of the individual states do not appear to weigh heavily in the decision process.[370]

A further comment on federal/state relations is in order. Perhaps in response to the above, Australian states with an interest in the subject of FDI have formulated their own laws. Both Victoria and New South Wales (NSW) have related laws and regulations on the subject.[371] The NSW legislation is, in part, mineral-specific and is enforceable through the state's control of access to natural resources. With the exception of one major dispute in 1978, the state legislation has not affected the federal government's initiatives in this area. In Canada, the provinces have not actively pursued policies to dissuade FDI; in fact, the reverse generally holds. In conclusion, the federal/provincial issue has not been a major factor in the FDI/mineral sector debate, although some would suggest that the Government of Canada's hesitancy to alter the FIR Act is due, in part, to potential provincial reaction.

The final area to be covered is a discussion of the legislative base of the respective regulatory regimes. The Canadian scheme is enshrined in legislation, whereas its Australian counterpart is only partially so. The Foreign Takeovers Act obviously falls under this classification, but new business proposals, including all new mining projects, are technically subject to voluntary review. Nevertheless, the voluntary nature of the latter is purely illusionary since the Australian government has made it quite clear that it will, if necessary, utilize the Commonwealth's powers over foreign exchange transactions and exports to enforce the review scheme.

Some commentators suggest that the Australian reliance on these powers gives it an advantage over Canada in this regard. However, there do not appear to be any legal impediments to Canada's being able to employ an Australian-style scheme.[372] In fact, Canada does possess export controls that could, if necessary, be used for FDI control purposes; admittedly the nation has shown, in the past, a reluctance to do so in non-crisis situations. Obvious exceptions are in the areas of uranium and oil and gas exports.

In conclusion, although legislative differences exist between the schemes, it is difficult to see how they account for the relative success of the two regulatory systems.

Summary

In this chapter, I have attempted to present the major differences between the Australian and Canadian FDI/mineral-sector regimes. Many dissimilarities exist. Perhaps the most important of these are:

- FIRB reviews all new mineral projects, while FIRA reviews business enterprises only at the time of establishment within a given line of economic activity;
- the mineral sector is designated as a special area in Australia, but in Canada it falls within the general screening process;
- FIRB reviews all mineral lease acquisitions, whereas the FIR Act allows FIRA to review only those mineral leases that are associated with properties deemed to possess proven commercially viable reserves at the time of sale;
- FIRB relies on fixed criteria for FDI/mineral-sector decision making, whereas the Canadian authorities primarily rely on an open-ended bargaining scheme;
- the threshold levels used to establish an initial presumption of a transfer of control are somewhat lower in Australia than in Canada;

- Australians have historically been more active in rationalizing, before international audiences, the need for their FDI regulatory scheme than their Canadian counterparts.

I shall now turn to an overall summary of my findings and a presentation of those aspects of the Australian approach which might be usefully considered for implementation in Canada.

8. A Proposal for Change: Adaptation of the Australian System

Introduction

As outlined in the introductory chapter, the Government of Canada has been under intense political pressure to modify its foreign direct investment regulatory regime. To date,[373] the government's response has been limited to administrative and 'cosmetic' changes: substantive issues have been ignored.[374] However, as long as the economy continues to flounder, the costs of pursuing policies of economic nationalism will continue to rise. This phenomenon, in conjunction with the definite possibility of a federal general election in 1984, suggests that changes to the FIR Act will be seriously entertained by the present government.

Indeed, throughout 1982 subtle hints appeared in the press suggesting that, if changes are made to the FIR Act and the related policies, they will probably entail the adoption of a key-sector approach within the general screening system.[375] In the mineral sector, available evidence indicates that the federal government continues to informally promulgate its 1978 Cabinet resolution, which calls for a minimum 50-percent Canadian ownership in all new mining projects, as a feasible long-term objective. For example, the Hon. Judy Erola, then Minister of State for Mines, was reported to have said in 1982:

> Foreign investors planning joint ventures on other investments in Canada must ensure that Canadians have a major stake in the development, Mrs. Erola said, citing a policy in effect since 1974.
>
> The Government wants to see at least 50 percent Canadian ownership, but it may be prepared to accept less if the overall investment passes a 'significant benefit' test.[376]

It is for this reason that this study focused on the merits of the Australian scheme. Without repeating our findings, a summary of which appears in chapter 7, it can be said that the Australian program has been rather successful in regulating FDI in the mineral sector. Given the basic institutional similarities between Canada and Australia, it follows that the Australian system should at least be considered in examining possible improvements to its beleaguered Canadian counterpart.[377]

Proposal for Change

Based on the analysis conducted in the preceding chapters, I suggest that the Canadian policy makers give careful consideration to adopting the 'Australian' model, to replace the current open-ended system for evaluating foreign direct investment proposals in the mineral sector. This would entail the following measures:

i the designation of the mineral sector as a special area within a general screening system;

ii a shift in the focal point of review from the corporate entity to the individual resource project, and the utilization of quantifiable sector-specific criteria in order to judge the suitability of individual proposals in respect of all new mining projects[378] (if warranted, the sector can be further divided into subsets such as energy and nonenergy minerals, and differential criteria can be developed);

iii the introduction of a transitional device to facilitate naturalization, i.e. the transfer of foreign firms to majority Canadian ownership status, in order to minimize the impact of subjecting all new mine proposals to review.

SPECIAL AREA DESIGNATION

It is suggested that consideration be given to amending the FIR Act to facilitate the explicit designation of special areas, one of which should be the mineral sector. This allows for the development of sector-specific rules which recognize the differential impact of different sectors on economic and growth. It is apparent that a general screening system is not suited to doing this. Indeed, part of the reason that the current Canadian system is largely unresponsive to the needs of the mining industry is that it was designed to cope with the peculiarities of the manufacturing sector (a sector, in the eyes of the planners, characterized by U.S. branch plants exhibiting the symptoms of a truncated firm[379]).

If, as suggested in chapter 2, the critical factor in the FDI/mineral-sector debate are the issues of economic rent, transfer pricing and economic patriotism, it follows that the regulatory regime should evaluate proposals primarily with respect to the project's impact on these factors. In other words, the pursuit of policy measures designed to address less important objectives may result in foregone investment and hence reduced economic benefits, without the generation of offsetting advantages.

The rationale for employing a key-sector framework is that it would permit utilization of rules and targets that are sensitive to the peculiarities of the institutional, economic, and technological environments found between and even within sectors. In chapter 2 it was noted that the mining industry differs in many substantive ways from, say, the manufacturing or financial sectors. For example, we found that the particular characteristics of the mineral sector suggest that a focus on domestic ownership levels rather than control is more appropriate for this sector than it is for, say, culturally sensitive industries such as broadcasting and newspapers.

If FDI is to be subject to controls, then the fixed-rule scheme is attractive to investors. It provides them with a relatively certain decision-making framework, and lets them determine if their proposals are likely to be accepted by the review agency. If the application is perceived to be unacceptable, it is apparent what must be done to reverse the expected decision. A fixed-rule system also aids the review agency. It makes it possible to process applications much more rapidly than at present; this, of course, also aids the investor. In addition, economic nationalists gain as well, since the government is now forced to reveal its 'true' industrial and foreign investment strategy; it can no longer hide behind a nebulous 'significant benefits' test. These people further gain because the fixed-rule system makes any attempt to grant 'special deals' rather obvious. Governments will, as the Fraser government demonstrated, hesitate to rely extensively on the 'extenuating circumstance' argument.

Before leaving this subject, it should be mentioned that, rather than reviewing the mineral sector as a homogeneous entity, the special-area argument can be utilized to justify further disaggregation. Given the interest in energy issues in recent years, the government might wish to restrict FDI more highly in energy minerals than in nonenergy activities. This approach is consistent with that espoused in the National Energy Program and several other *ad hoc* policy developments since 1970. It also recognizes that it is the energy sector which has given rise to most of the public concern over the issues of economic rent appropriation and security of supply.

All of these factors suggest that the oil and gas, coal, and uranium industries might be designated as a separate area; investment proposals within this group would then be required to meet more stringent criteria than those in the nonenergy area. This approach should be politically acceptable, since the nonenergy mineral industry is currently characterized by minimal rent generation, a relatively high degree of

Canadian ownership, and limited association with issues of security and morality of supply.

EXTENT OF THE REVIEW PROCESS

One strength of the Australian screening system is that it subjects to review all new mining projects involving foreign interests. In contrast, we saw that part of FIRA's difficulty in coping with mineral applications is the basic quandary that it encounters: it tries to enforce Cabinet's 1978 mandate to ensure a minimum of 50 percent Canadian ownership in all new projects, but its legislative framework does not facilitate the attainment of this objective, since it designates the business enterprises as the focal point of the review process.

In order to rectify this problem it is proposed that the FIR Act be amended to facilitate screening of all new mining projects. This will allow FIRA to pursue the minimum Canadian ownership targets legitimately and more successfully, as outlined in the Prime Minister's 1974 speech and latter reaffirmed by Cabinet. In order to increase the political acceptability of this proposal, it is suggested that serious consideration be given to exempting, for a given period of time, current leaseholders from the project-specific equity requirements. That is, from the date of announcement or enactment, existing leaseholders would be given a fixed time period in which to develop the property without having to satisfy the new regulations. A modified version of this scheme was employed with apparent success in 1970 to restrict FDI in Canada's uranium mining industry.[380]

NATURALIZATION SCHEME

If all new mining projects are subjected to review, it may be advisable to employ an 'Australian' style naturalization program. This scheme is designed to minimize the harm inflicted on established foreign-owned firms whose expansions within existing lines of economic activity will now, for the first time, be subject to review.

The innovative Australian approach appears to be transferable to the Canadian scene with limited modification. The reader will recall that the naturalization program allows those firms already exhibiting a significant degree of domestic ownership (more than 25 percent) to receive prior credit for 51 percent Australian ownership; hence their mining projects are no longer subject to review providing that they publicly agree to reach the designated level at some future date.

As implied above, I would suggest one minor alteration to the Australian program prior to adoption in Canada. Rather than relying upon an open-ended timetable for attainment of the desired local ownership target, it is probably preferable to utilize a fixed-date system. Under such an approach, firms would be given, say, 10 years within which to reach the domestic ownership target; if they do not reach the objective within the stated time, specified sanctions should apply.[381] This would increase the political integrity and acceptability of the scheme to the critics of FDI.

OVERVIEW OF THE PROPOSED SYSTEM

Adoption of the proposed scheme would negate many of the criticisms levied against the current Canadian FDI/mineral sector regulatory system. The new scheme would employ relatively clear-cut rules; be amenable to rapid yet thorough decision making by government; encourage Canadianization of existing foreign operations; and yet be equitable to all foreign investors. It should be noted that, in order for the special-sector approach to operate properly, it will be necessary for the government to issue explicit and publicly-released policy directives to FIRA.

Problems of Implementation

Substantial policy changes almost always generate distributional consequences; this normally leads to objections from the uncompensated 'losers'. If the essential elements of the 'Australian' system were adopted in Canada, the major casualty would be the existing foreign enterprises who wished to expand within their present lines of economic activity. However, the impact of the change could be ameliorated by the use of the naturalization program and the initial exemption of present leaseholders from the proposed review process.

Since a large proportion of the affected firms are U.S. owned, the Canadian government may fear a recurrence of the 1981-82 conflict with Washington. On the other hand, the proposed program would address many of the U.S. government's present concerns. It is noteworthy that the Australian system would be much easier for Canadian politicians to defend before the international financial community and multilateral organizations such as GATT than is the present open-ended bargaining-based scheme.

Summary

It should be stressed that in the uranium mining industry Canada has employed an FDI regulatory mechanism that is somewhat similar to the Australian system. Interestingly, this industry has not suffered from a lack of investment capital or technological progress. Indeed, Canada is a world leader in this field, despite a policy that limits foreign ownership to 33 percent in new mine development.[382] While it is true that the industry is currently depressed, this is almost universally perceived to be a problem of market prices; it is not attributable to inadequate operating capacity, antiquated plant, or a lack of proven high-grade reserves.

Canada's relative success in the uranium mining field (even though our policy is based only on speeches and draft legislation) suggests strongly that a more thoroughly designed program, applicable to all mining activities, should represent a significant improvement over the current system. Indeed, the proposed approach has the potential to benefit, in aggregate, all of the major interest groups: mining firms, government, and economic nationalists.

Notes

1. *Foreign Investment Review Act*, S.C. 2973-74, C.46.
2. For example, see the following quote from J.A. Langford, *Canadian Foreign Investment Controls*, 2nd Edition (Don Mills, Ontario: CCH Canadian Limited, 1979), p. iii:

> In the years since the statute was originally proclaimed it has become much less of a threat in the eyes of foreign businessmen and more of a technical hurdle to be met and dealt with in technical terms such as the provisions of the Income Tax Act and of the Securities Acts.

3. Thomas Enders, *Speech at Stanford University*, 3 May 1979. Quoted from Stephen Clarkson, *Canada and the Reagan Challenge* (Ottawa: Canadian Institute for Economic Policy, 1982), p. 86.
4. Hon. P.E. Trudeau, Prime Minister, Notes for Remarks to the Toronto Ad and Sales Club, Toronto, 12 February 1980, pp. 9-10.
5. Department of Energy, Mines and Resources, *The National Energy Program 1980* (Ottawa: Supply and Services, 1980), p. 50.
6. For a broad discussion of recent issues in U.S./Canada relations, with reference to foreign direct investments, see Stephen Clarkson, *Canada and the Reagan Challenge*; various articles in the special supplement (entitled 'Canada – United States Trade and Policy Issues') to *Canadian Public Policy*, vol. VIII, Supplement, October 1982, especially R.S. Saunders, 'Continentalism and Economic Nationalism in the Manufacturing Sector: Seeking Middle Ground', pp. 463-479; Janette Mark and Carol Nelder-Corvari, 'The Nationalist Quagmire: A Lesson on Continental Integration', published in *The Ian Macdonald Student Essays 1981-82* (Ottawa: School of Public Administration, Carleton University, 1983), pp 1-54; and Ronald J. Wonnacott, 'Controlling Trade and Foreign Investment in the Canadian Economy: Some Proposals', *Canadian Journal of Economics*, vol. XV, no. 4, November 1982, pp. 567-585.
7. For details on the reaction of the U.S. corporate and governmental interests, see Stephen Clarkson, *Canada and the Reagan Challenge*, ch. 4. Criticism by representatives of the European Economic Community, United Kingdom, and West Germany is noted in the following newspaper reports: 'Canada's Policies on Trade Criticized', *Leader-Post*, Regina, 26 June 1982, p. D5; Lyndon Watkins, 'Canada-U.K. Chamber Seeks Changes to FIRA', *Globe and Mail*, Toronto, 25 June 1982, p. B2; and Josh Moskau, 'Investment in Canada "incredibly repelled" by FIRA', *Globe and Mail*, Toronto, 29 October 1982, p. R2.
8. See Government of Canada, *Economic Development for Canada in the 1980's* (Ottawa: Department of Finance, November 1981), p. 12.
9. Department of Energy, Mines and Resources, *Mineral Policy: A Discussion Paper, December 1981* (Ottawa: Supply and Services, 1981), pp. 66.
10. See Stephen Clarkson, *Canada and the Reagan Challenge*, p. 104.
11. The most recent concerted attack took place at the 23rd Conference of Premiers, Halifax, August 24-26, 1982. The nature of the criticism can be found in Michael

Harris and Margot Gibb-Clark, 'Premiers Reach Wide Accord on Economic Recovery Plan', *Globe and Mail*, Toronto, 26 August 1982, p. 1; Michael Valpy, 'FIRA Strikes Again', *Globe and Mail*, Toronto, 27 August 1982, p. 6; and Ray Guay, 'Foreign Investment Review Agency Criticized by Provinces', *Leader-Post*, Regina, 15 September 1982, p. B11.

12. Quoted from 'Call to Abolish FIRA rejected by Trudeau', *Globe and Mail*, Toronto, 8 September 1982, p. 2.
13. Canadian Bar Association, Brief to the Hon. Herb Gray, Minister of Industry, Trade and Commerce on the Foreign Investment Review Act, Ottawa, 24 September 1981.
14. For example, see 'Bring Back Investment, PC Chief Urges', *Globe and Mail*, Toronto, 6 September 1982, p. 9; and Michael Valpy, 'Clark's Fuzzy FIRA Claims', *Globe and Mail*, Toronto, 23 September 1982, p. 6.
15. Michael Bliss, 'The Battle that Business Lost', *Canadian Business*, vol. 55, no. 11, November 1982, p. 48.
16. For details, see Anthony Scott, 'Who Should Get Natural Resource Revenues?', in Anthony Scott, editor, *Natural Resource Revenues: A Test of Federalism* (Vancouver: University of British Columbia Press, 1976), pp. 1-51.
17. Hon. P.E. Trudeau, Prime Minister, Points for an Address on Industrial Development and Resources Policy, 28 June 1974, pp. 2-3.
18. *Ibid.*, p. 3.
19. For support, see Gorse Howarth, Commissioner of the Foreign Investment Review Agency, 'Canada's Energy Wealth: How Much for Sale', Speech to Financial Post Conference, New York, 19 November 1980, pp. 1-3.
20. See Jennifer Lewington, 'Erola Planning to Visit West Germany, U.S.', *Globe and Mail*, Toronto, 21 October 1982, p. B2. According to the article:

    > Foreign investors planning joint ventures or other investments in Canada must ensure that Canadians have a major stake in the development, Mrs. Erola said, citing a policy in effect since 1974. The Government wants to see at least 50 percent Canadian ownership, but it may be prepared to accept less if the overall investment passes a 'significant benefit' test.

21. For a thorough discussion of performance undertakings, see Canadian Bar Association, Brief to the Hon. Herb Gray, Minister of Industry, Trade and Commerce on the Foreign Investment Review Act, pp. 35-38; Richard Schultz, Frank Swedlove and Katherine Swinton, *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act*, Working Paper No. 6, Regulation Reference Series (Ottawa: Economic Council of Canada, September 1980), and chapter 3 of this study. It must be stressed at this point that these agreements are said to be voluntary; however, from an applicant's perspective, this is largely illusionary since they may weigh heavily in the decision calculus.
22. For example, see the following quote from Hon. Herb Gray, 'Canada-United States: The Foreign Investment Issue', Remarks for a speech to Americas Society Conference, New York City, 30 September 1982, p. 13:

    > The second fact relates to a point I made earlier about the limited scope of FIRA. Thus, while in 1981 proposed direct investments reviewed by FIRA amounted to $2.6 billion, the value of Canadian assets held by foreign-owned companies already doing business in Canada increased by some $25 billion. Much of this asset growth was due to new investments in current and related business by existing foreign-controlled companies and these investments were not subject to review. Also not FIRA-reviewable are portfolio investments, which in 1981 brought a further $10.8 billion into Canada.

23. For details, see G.D.A. McDougal, 'The Benefits and Costs of Private Investment from Abroad', *Economic Record*, vol. 36, no. 1, March 1960, pp. 13-15; and Thomas G. Parry, *The Multi-national Enterprise: International Investment and Host-Country Impacts* (Greenwich, Connecticut: JAI Press Inc., 1980), ch. 1.
24. See Government of Canada, *Foreign Direct Investment in Canada* (Gray Report) (Ottawa: Information Canada, 1972), pp. 13-15.
25. Stephen H. Hymer, *The International Operations of National Firms: A Study of Direct Foreign Investment* (Cambridge, Mass.: MIT Press, 1976). This book publishes, for the first time, Hymer's Ph.D. dissertation completed in 1960.
26. Richard Caves, 'International Corporations: The Industrial Economics of Foreign Investment', *Economica*, vol. 38, February 1971, pp. 1-27.
27. Raymond Vernon has published numerous works on the subject; see for example *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises* (New York: Basic Books, 1972).
28. For a excellent survey, see Richard Caves, *Multinational Enterprise and Economic Analysis*, (Cambridge: Cambridge University Press, 1982). Other interesting references include:
    B.L. Johns, 'Private Overseas Investment in Australia: Profitability and Motivation', *Economic Record*, June 1967; Harry Johnson, 'The Efficiency and Welfare Implications of the International Corporation', in *The International Corporation*, edited by Charles P. Kindleberger (Cambridge, Mass.: MIT Press, 1970), pp. 35-56; and Alan M. Rugman, *Multinationals in Canada: Theory, Performance, and Economic Impact* (Boston: Martinus Nyhoff Publishing, 1980).
29. The optional strategy to be followed by a firm with respect to setting up a branch plant licensed to sell technology is discussed by Raymond Vernon, 'International Investment and International Trade in the Product Cycle', *Quarterly Journal of Economics*, vol. 30, May 1966, pp. 190-207.
30. The rents alluded to here can be labelled as technological rents since they flow from superior knowledge possessed by a given firm. They are quite distinct from scarcity or resource rents which form the basis of the dominant arguments advanced in favour of restricting FDI in the mineral sector.
31. In some respects, this argument is quite similar to the 'defensive' investment rationale discussed above.
32. For details, see Raymond Vernon, 'International Investments and International Trade in the Product Cycle', pp. 190-207.
33. For a discussion of technological diffusion, see Thomas G. Parry, *The Multinational Enterprise: International Investment and Host-Country Impacts*, pp. 76-82.
34. The contribution of increased mineral exports to the balance of payments is sometimes noted. Although such an impact is generally assumed to be positive, alternative outcomes are possible. The overall issue is well summarized by Gordon Jackson, General Manager, CSR Limited, 'A Mining Industry Perspective', in Stuart Harris and Geoff Taylor, eds., *Resource Development and the Future of Australian Society* (Canberra: Centre for Resource and Environmental Studies, Australian National University, 1983), p. 59:

    > The movement of that capital, and the earnings from exporting the resources, tend to strengthen the external account ... Strengthening of the exchange rate naturally tends to reduce Australian dollar earnings of export industries, including the rural and manufacturing industries, and to weaken their export competitiveness. .... It is not possible to have it both ways.

35. The following discussion on the truncated firm thesis is largely based on Government of Canada, *Foreign Direct Investment in Canada* (Gray Report).
36. See Statistics Canada, *Canadian Imports by Domestic and Foreign Controlled Enterprises* (Ottawa: Supply and Services, 1981).
37. For details, see Government of Canada, *Foreign Ownership and the Structure of Canadian Industry: Report of the Task Force on the Structure of Canadian Industry* (Watkins Report) (Ottawa: Privy Council Office, January 1968).
38. See Richard Caves, 'International Corporations: The Industrial Economics of Foreign Investment.'
39. Meyer W. Bucovetsky and Malcolm Gillis, 'The Design of Mineral Tax Policy', in Malcolm Gillis *et al.*, eds., *Taxation and Mining: Nonfuel Minerals in Bolivia and Other Countries* (Cambridge, Mass.: Ballinger, 1978), p. 97.
40. For example, see: B.W. Wilkinson, *Canada in the Changing World Economy* (Montreal: C.D. Howe Research Institute, 1980), pp. 92-93; the various papers contained in Anthony Scott, editor, *Natural Resource Revenues: A Test of Federalism* (Vancouver: University of British Columbia Press, 1976); and Anthony Scott, *Central Government Claims to Mineral Revenues*, Occasional Paper No. 8 (Canberra: Centre for Research on Federal Financial Relations, The Australian National University, 1978).
41. As is characteristic of the 'net benefit' or 'economic rent' debate, terms such as 'fair' and 'significant' are not defined herein with precision.
42. This issue is further complicated in Canada and Australia by the fact that the resources belong to the individual provinces and states, not to the federal government. Although this issue has been more contentious in Canada, the potential clearly exists for a major federal/state dispute in Australia over the appropriation of economic rents and hence effective ownership of nonrenewable resources. The probability of this actually occuring would increase if the newly-elected Hawke government attempts to introduce its long-promised resource rent tax.
43. Although very few orebodies in Canada are yielding economic rents at the present time, due to poor market conditions, the validity of the argument still stands. The discussion pertains to the financial viability of the project over its lifetime, not to any one point in time.
44. For example, see: Australian Labor Party, *National Issues Relating to the Rapid Expansion of Mineral Production During the Eighties*, Canberra, May 1982.
45. B.W. Wilkinson, *Canada in the Changing World Economy*, p. 92
46. The reader will recall that when the four western provinces dramatically increased various mining, oil and gas taxes (and royalties) in the 1971-74 period, the Government of Canada responded, in its 6 May 1974 Budget, by declaring all such payments to be nondeductible for federal corporate income tax purposes. The federal government believed that it had to act in order to protect its tax base; the provincial response was that the tax base, in this case, belonged totally to the provinces since the British North American Act clearly grants the provinces ownership over natural resources. In some ways, this dispute continues to the present and is said to be a major rationale for the development of the federal government's National Energy Program.
47. Although it will not be addressed here, public ownership is a policy option which can be used to extract economic rents. For a discussion of this approach, see for example: Eric Kierans, *Report on Natural Resources Policy in Manitoba* (Winnipeg: Secretariat for the Planning and Priorities Committee of Cabinet, Government of Manitoba, 1973); and John Cohen and Michael Krashinsky, 'Capturing the Rents on Resource Land for the Public Landowner: The Case for a Crown Corporation', *Canadian Public Policy*, vol. 2, Summer, 1976, pp. 411-423. Given the recent Su-

preme Court of Canada decision on the tax status of provincial crown corporations in the oil and gas industry (see *Reference re the Natural Gas and Gas Liquids Tax*. (S.C.C.) unreported, June 23, 1982; [1981] 3 W.W.R. 408 (Alberta C.A.)), provinces may be encouraged to follow the public ownership route in order to prevent economic rents from being captured, in part, by the Government of Canada. For details, see N.D. Banks, 'Reference Re the Natural Gas and Gas Liquids tax', *Resources: The Newsletter of the Canadian Institute of Resources Law*, no. 2, September 1982, pp. 2-3.

48. See B. W. Wilkinson, *Canada in the Changing World Economy*, p. 92; and Stephen Clarkson, Canada and the Reagan *Challenge* (Ottawa: Canadian Institute for Economic Policy, 1982) pp. 70-71.
49. This definition reflects the usage of the term by economists and political scientists. It should be stressed that the managerial accounting literature employs the same term (transfer pricing) in a nonderogatory fashion to reflect any non-market cost allocation.
50. A discussion of this issue can be found in Alan M. Rugman, *Multinationals in Canada: Theory, Performance and Economic Impact*, pp. 91-94; Thomas G. Parry, *The Multi-national Enterprise: International Investment and Host-Country Impacts*, ch. 6; and L. W. Copithorne, 'International Corporate Transfer Pricing and Government Policy', *Canadian Journal of Economics*, August 1971. Two of the better empirical studies are S. Lall, 'Determinants and Implications of Transfer Pricing by International Firms', *Bulletin of the Oxford Institute of Economics and Statistics*, 1973; and C. V. Vaitsos, *Transfer of Resources and Preservation of Monopoly Rents* (Cambridge, Mass.: Harvard Advisory Service, 1970).
51. Stuart Harris, 'Future Minerals and Energy Trade, in P. Hastings and A. Farran, editors, *Australia's Resources Future* (Melbourne: Nelson in association with the Australian Institute of International Affairs, 1978), ch. 3.
52. Ben Smith, 'Resources and Australian Economic Development', in F.H. Gruen, *Surveys of Australian Economics, Vol. III* (Sydney: George Allen and Unwin, 1983), p. 109.
53. B.W. Wilkinson, *Canada in the Changing World Economy*, p. 84.
54. Charles Pye, *Profitability in the Canadian Mineral Industry* (Kingston: Centre for Resource Studies, Queen's University, 1981), pp. 62-65.
55. Alan M. Rugman, *Multinationals in Canada: Theory, Performance and Economic Impact*, pp. 95-99.
56. B.W. Wilkinson, *Canada in the Changing World Economy*, p. 93.
57. The remainder of this paragraph is based on *ibid*., pp. 92-94.
58. This line of thought can be found in Kari Levitt, *Silent Surrender: The Multinational Corporation in Canada* (Toronto: Macmillan, 1971); and Abraham Rotstein, *The Precarious Homestead: Essays on Economics, Technology and Nationalism* (Toronto: New Press, 1973).
59. For example, see Government of Canada, *Foreign Ownership and the Structure of Canadian Industry: Report of the Task Force on the Structure of Canadian Industry* (Watkins Report); Kari Levitt, *Silent Surrender: The Multinational Corporation in Canada* (Toronto: Macmillan, 1970); and Abraham Rotstein, *The Precarious Homestead: Essays on Economics, Technology and Nationalism* (Toronto: New Press, 1973).
60. See Stephen Clarkson, *Canada and the Reagan Challenge*, pp. 101-103.
61. For details, see Earle Gray, *The Great Uranium Cartel* (Toronto: McClelland and Stewart, 1982); and June H. Taylor and Michael D. Yokel, *Yellowcake: The International Uranium Cartel* (New York: Pergamon Press, 1980).

62. This issue was discussed in the Royal Commission on Canada's Economic Prospects (Gordon Report). *Final Report* (Ottawa: Queen's Printer. 1957). pp. 375-400; Government of Canada. *Foreign Ownership and the Structure of Canadian Industry: Report of the Task Force on the Structure of Canadian Industry* (Watkins Report) (Ottawa: Privy Council Office. January 1968); and the *Eleventh Report of the Standing Committee on External Affairs and National Defence Respecting Canada-U.S. Relations*. Second Session. 28th Parliament (Wahn Report).

63. Historical data can be found in John Fayerweather. *Foreign Investment in Canada: Prospects for National Policy* (Toronto: Oxford University Press. 1974). ch. 2; and F.J. Fletcher and R.J. Drummond. *Canadian Attitude Trends*. 1960-1978. Institute for Research on Public Policy. Montreal. Working Paper No. 4. August 1979. More recent public opinion poll results can be found in Michael Valpy. 'Clark's Fuzzy FIRA Claims'. *Globe and Mail*. Toronto. 23 September 1982. p. 6; and Bob Hepburn. '64% Back Ottawa in Canadianizing Oil Industry: Poll'. *Toronto Star*. 23 January 1982.

64. The 'truncated firm' theory was promulgated by the Gray Report. It is based on the Hymer's model of the MNE as it applies to the manufacturing industry. According to the theory. the profit-maximizing MNE will tend to undertake little research and development activity in Canada. will make its critical decisions in the home country. and will generally not supply the branch plant with an export mandate. Hence. higher-level. quality jobs will remain the preserve of citizens of the home country. For details. see Government of Canada. *Foreign Direct Investment in Canada* (Gray Report).

65. This problem is outlined in any standard text on cost-benefit analysis. For example. see E.J. Mishan. *Cost-Benefit Analysis: An Informal Introduction* (London: George Allen & Unwin. 1975); and Robert Gugden and Alan Williams. *The Principles of Practical Cost-Benefit Analysis* (Oxford: Oxford University Press. 1978).

66. For a discussion of public goods in an economic nationalist setting. see Albert Breton. 'The Economics of Nationalism'. *Journal of Political Economy*. vol. 72. no. 4. August 1964. pp. 377-378; and Harry Johnson. 'A Theoretical Model of Economic Nationalism in New and Developing States'. *Political Science Quarterly*. vol. LXXX. no. 2. June 1965. A theoretical presentation of public goods can be found in any standard public finance text such as Robin W. Boadway. *Public Sector Economics* (Cambridge. Mass.: Winthrop Publishers. Inc.. 1979). ch. 4.

67. See Robin W. Boadway. *Public Sector Economics*. p. 31.

68. For a thorough discussion of the pragmatic aspects of preference disclosure within a 'quasi-free-rider' environment. see Douglas G. Hartle. *Public Policy Decision Making and Regulation* (Montreal: Institute for Research on Public Policy. 1979). For an example of interest group tactics within the mineral sector. see M.W. Bucovetsky. 'The Mining Industry and the Great Tax Reform Debate'. in A. Paul Pross. editor. *Pressure Group Behaviour in Canadian Politics* (Toronto: McGraw-Hill Ryerson. 1975). pp. 89-114.

69. This observation is based on the work by Albert Breton. 'The Economics of Nationalism' and Harry Johnson. 'A Theoretical Model of Economic Nationalism in New and Developing States'. An enlightening critique of their model is presented by Mel Watkins. 'The Economics of Nationalism and the Nationality of Economics: A Critique of Neoclassical Theorizing'. *Canadian Journal of Economics*. vol. 4. no. 2 (Supplement). November 1978. pp. S87-S120.

70. Interestingly. Canadian mining officials appear to oppose FDI restrictions. One explanation is that mining company officials are caught up in the prevailing business view that government regulation and interference in the economy. such as FIRA activities. is inherently 'bad'. Another view could be that they do not perceive the

foreign firms as competitors, but rather that the Canadian industry gains tangible benefits from their presence in Canada. Perhaps a better explanation is that since virtually all of mineral output is exported, and most of this to the USA, mining officials worry that their access to markets may be restricted if home governments take retaliatory action against Canada for restrictive FDI practices. A final perspective is that Canadian mining firms tend themselves to be MNEs and hence it may be in their long-run global interests to have a relatively open FDI policy in Canada in order to improve their negotiating position with third-world nations (in other words, to avoid charges of hypocrisy if they object to the FDI restrictions imposed by other regimes). Australian mining firms, in contrast, with the notable exception of CRA and BHP investments in Papua New Guinea, tend to focus on home country developments.

71. For example, Colin Thatcher, while Minister of Saskatchewan's Department of Energy and Mines, strongly criticized both FIRA and NEP. According to a news report,

> FIRA, he said, may make sense in industrial Ontario, but not in Western Canada, which needs foreign capital to develop its energy resources. 'People in Ontario seem to like FIRA because it prevents manufacturing industries from being purchased by foreigners, and being shut down sometime in the future,' he said. 'I can understand that logic. What puzzles me is why that rationale is applied to resource development in Western Canada. We need the investment.'

Quoted from 'Thatcher Puts Blame on NDP and Ottawa', *Leader Post*, Regina, 21 September 1982, p. A18.

72. See Kenneth H. Norrie, 'Natural Resources, Economic Development, and U.S.-Canadian Relations: A Western Canadian Perspective', in Carl E. Beigie and Alfred O. Hero, Jr., *Natural Resources in U.S.-Canadian Relations*, vol. 1 (Boulder, Colorado: Westview Press, 1980), p. 297.
73. See Garth Stevenson, *The Control of Foreign Direct Investment in a Federation: Canadian and Australian Experience*, pp. 24, 28, 32-33.
74. Government of Canada, *Foreign Direct Investment in Canada* (Gray Report), pp. 452-517.
75. Although this approach was obviously followed for pragmatic reasons, the report can be criticized for failing to discuss the interrelations between the schemes.
76. The discussion contained within this subsection draws heavily upon Government of Canada, *Foreign Direct Investment in Canada* (Gray Report), pp. 451-492.
77. See Thomas G. Parry, *The Multi-national Enterprise: International Investment and Host-Country Impacts*, p. 152.
78. The Australian government, particularly the Treasury, appears to have accepted this line of thought. For example, in Australia, Treasury, *Resource Development: Maximizing Opportunities*, Submission to the Senate Standing Committee on Natural Resources: The Development of the Bauxite, Alumina, and Aluminium Industries (Canberra: Australian Government Publishing Service, 1981), p. 21, the Treasury states:

> As indicated earlier, the presence of Australian partners in projects for the processing of raw materials, such as alumina refining and aluminium smelting, is particularly appropriate where the extractive and processing function are closely integrated. Substantial, independent Australian participation is one means of attempting to ensure arm's length pricing for bauxite and alumina for taxation and other purposes.

79. Discussion of this problem and many others can be found in Richard Schultz, Frank Swedlove and Katherine Swinton, *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act*, Working Paper No. 6, Regulation Reference (Ottawa: Economic Council of Canada, 1980).

80. For details, see William L. Marr and Donald G. Paterson, *Canada: An Economic History* (Toronto: Gage, 1980), pp. 266-270; and Government of Canada, *Foreign Direct Investment in Canada* (Gray Report) (Ottawa: Information Canada, 1972) pp. 13-17.
81. Royal Commission on Canada's Economic Prospects (Gordon Report), *Final Report* (Ottawa: Queen's Printer, 1957).
82. *Ibid.*, chapter 18, pp. 375-400.
83. *Ibid.*, p. 397.
84. The information contained in the next two paragraphs is primarily based on Government of Canada, *Foreign Ownership and the Structure of Canadian Industry: Report of the Task Force on the Structure of Canadian Industry* (Watkins Report) (Ottawa: Privy Council Office, January 1968), pp. 384-389.
85. The guidelines entitled 'Some Guiding Principles of Good Corporate Behaviour for Subsidiaries in Canada of Foreign Companies', were first disseminated in a letter by then Minister of Trade and Commerce, Hon. Robert H. Winters, dated 31 March 1966, Ottawa, to subsidiaries of foreign companies operating in Canada. The documents are reproduced in *Eleventh Report of the Standing Committee on External Affairs and National Defence Respecting Canada-U.S. Relations*, Second Session, 28th Parliament (Wahn Report) (Ottawa: Queen's Printer, 1970), pp. 81-83.
86. Government of Canada, *Foreign Ownership and Structure of Canadian Industry* (Watkins Report).
87. *Ibid.*, p. 27.
88. *Ibid.*, p. 345.
89. *Ibid.*, pp. 395-397.
90. *Eleventh Report of the Standing Committee on External Affairs and National Defence Respecting Canada-U.S. Relations*, Second Session, 28th Parliament (Wahn Report).
91. *Ibid.*, p. 136.
92. *Ibid.*, p. 138.
93. *Ibid.*, p. 138.
94. Government of Canada, *Foreign Direct Investment in Canada* (Gray Report).
95. *Ibid.*, p. 5.
96. See pp. 10-11 for a discussion of this topic.
97. *Ibid.*, p. 45.
98. *Ibid.*, pp. 45-47.
99. *Ibid.*, p. 413.
100. *Ibid.*, p. 50.
101. *Ibid.*, chapter 25, pp. 451-492.
102. See Richard Schultz, Frank Swedlove and Katherine Swinton, *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act*, Working Paper No. 6, Regulation Reference (Ottawa: Economic Council of Canada, 1980), p. 14.
103. For details, see Government of Canada, *Foreign Direct Investment in Canada* (Gray Report), pp. 451-452.
104. Hon. P.E. Trudeau, Prime Minister, *Statement in the House of Commons Regarding Foreign Ownership in the Canadian Uranium Mining Industry*, Ottawa, 2 March 1970.
105. Hon. J.J. Greene, Minister of Energy, Mines, and Resources, *Statement Regarding Foreign Ownership in the Canadian Uranium Mining Industry*, Ottawa, 19 March 1970. The policy applied to all resales of existing mines; with respect to new mines, it only pertained to those based on deposits discovered on lands leased after 2 March 1970.

106. See David Crane, *Controlling Interest: The Canadian Gas and Oil Stakes* (Toronto: McClelland and Stewart, 1982), pp. 63-65.

107. For supporting evidence, see John Fayerweather, *Foreign Investment in Canada: Prospects for National Policy* (Toronto: Oxford University Press, 1974), ch. 2.

108. *Foreign Investment Review Act*, S.C. 1973-74, c. 46.

109. For an excellent discussion of the act, see Richard Schultz, Frank Swedlove and Katherine Swinton, *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act*.

110. The *Foreign Investment Review Act*, s.3(1) defines a 'non-eligible person' as
    (a) an individual who is neither a Canadian citizen nor a permanent resident within the meaning of the Immigration Act, 1976 and includes
        (i) a Canadian citizen who is not ordinarily resident in Canada and who is a member of a class of persons prescribed by regulation for the purposes of this definition, and
        (ii) a permanent resident who has been ordinarily resident in Canada for more than one year after the time at which he first became eligible to apply for Canadian citizenship,
    (b) the government of a country other than Canada or of a political subdivision of a country other than Canada, or an agency of such a government, or
    (c) a corporation incorporated in Canada or elsewhere that is controlled, in any manner that results in control in fact, whether directly through the ownership of shares or indirectly through a trust, a contract, the ownership of shares of any other corporation or otherwise, by a person described in paragraph (a) or (b) or by a group of persons any member of which is a person described in paragraph (a) or (b).

111. See *Foreign Investment Review Act*, s.3(2).

112. This policy is based on a liberal interpretation of the *Guidelines Concerning Acquisitions of Interests in Oil and Gas Rights* issued 5 January 1976 under the provisions of subsection 4 (2) of the Foreign Investment Review Act. In particular, the mineral sector policy on leases is based on the following: 'a property which is at the stage of production will ordinarily be presumed to be a business if it can reasonably be expected to sustain a separate business, by reason, for example, of the existence of proven reserves.

113. Foreign Investment Review Agency, 'Guidelines Concerning Related Business', *Office Consolidation: Foreign Investment Review Act* (Ottawa: Supply and Services, 1978), pp. 73-93.

114. Foreign Investment Review Agency, *Businessman's Guide to the Foreign Investment Review Act* (Ottawa: Foreign Investment Review Agency, 1981), p. 17.

115. Foreign Investment Review Agency, *Office Consolidation: Foreign Investment Review Act*, p. 88.

116. See *Foreign Investment Review Act*, s.2(1).

117. *Ibid.*, s.2(2).

118. For a thorough discussion of the review process, see Richard Schultz, Frank Swedlove and Katherine Swinton, *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act*; and 'How FIRA Works', *Foreign Investment Review*, vol. 6, no. 1, Autumn 1982, pp. 7-8.

119. Quoted from Richard Schultz *et al.*, *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act*, p. 72.

120. *Ibid.*, p. 72.

121. See *Foreign Investment Review Act*, s.11. A less legalistic interpretation can be found in 'How FIRA Works', p. 8.

122. This issue is discussed in Canadian Bar Association, *Brief to the Hon. Herb Gray, Minister of Industry, Trade and Commerce on the Foreign Investment Review Act*, Ottawa, 24 September 1981, pp. 31-34. It must be stated that the applicant may be partially, and even totally, responsible for delays.

123. See Hon. Allan J. MacEachen, Minister of Finance, *The Budget* (Ottawa: Department of Finance, 28 June 1981), p. 7. According to Hon. Herb Gray, Minister Responsible for the Foreign Investment Review Act, Remarks for a Speech to Americas Society Conference, 'Canada-United States: The Foreign Investment Issue', New York City, 30 September 1982, p. 18: 'under the new threshold 95 percent of the new-business and 80 percent of the acquisition proposals will be eligible for review under the shortened procedures, which in most cases means a decision within 21 days of the Government's receipt of notice'.

124. Richard Schultz *et al.*, *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act*, p. 58.

125. *Ibid.*, p. 46.

126. *Ibid.*, p. 65.

127. For example, the agency expects that: 'About 85 percent of all reviewable investment proposals fall under these thresholds and can be submitted on the short form. After a short-form application is complete and receipt has been certified, the Minister has only 10 days in which to decide whether the information provided in the abbreviated form will be sufficient to enable him to recommend, without delay, that the investment will be allowed.' ('How FIRA Works', p. 7)

128. The base of this calculation is identified by FIRA as 'application resolved'. It is the sum of applications that have been approved, disallowed, and withdrawn after certification but before Cabinet has made a final decision. It is this last category that creates interpretation problems: that is, why were they withdrawn? If they were all withdrawn for market- related reasons, then the acceptance rate (as reported herein) is understated. On the other hand, if they were all withdrawn due to frustration with the review process, then the data presented herein are correct. Undoubtedly both reasons are relevant and hence the acceptance rates presented in tables 4 and 5 are biased downwards. However, based on hearsay evidence, it is suggested that most applications are withdrawn for non-market reasons and hence the bias is trivial. The official view, as presented by FIRA officials, is that approximately 60 percent of all withdrawals are market related (for details, see 'FIRA Approvals at 86% in Year', *Globe and Mail*, Toronto, 20 November 1982, p. B14).

129. Preliminary data for the first nine months of the 1982/83 fiscal year, as reported for FIRA's aggregate activities, are not published on a sector-specific basis. Hence, it is not possible, at this time, to ascertain whether or not the minister responsible for the FIR Act and Cabinet have started to approve a higher percentage of mineral-related proposals than was the case over the 1979-82 period.

130. It is interesting to note that A. E. Safarian, 'Policy on Multinational Enterprises in Developed Countries', *Canadian Journal of Economics*, vol. XI, no. 4, November 1978, pp. 641-655, states that 'The disallowance rate by the Foreign Investment Review Agency is far higher than anything in the other countries examined here, if one considers only the same stage of formal submission of proposals' (p. 647). The 'other countries' referred to above are: United Kingdom, France, Italy, Federal Republic of Germany, Switzerland, Belgium, Norway, and Sweden.

131. Based on personal discussions held with FIRA officials, and on Hon. Herb Gray, Remarks for a Speech to Americas Society Conference, 'Canada – United States: The Foreign Investment Issue'. For example, Mr. Gray stated: 'Thus while in 1981 proposed direct investment reviewed by FIRA amounted to $2.6 billion, the value of Canadian assets held by foreign-owned companies already doing business in Canada

increased by some $2.5 billion. Much of this asset growth was due to new investments in current and related business by existing foreign-controlled comapnies and these investments were not subject to review. Also not FIRA-reviewable are portfolio investments, which in 1981 brought a further $10.8 billion into Canada.

132. The FIRA process has been criticized by many authors; the two major Canadian-based studies are: Canadian Bar Association, *Brief to the Hon. Herb Gray on the Foreign Investment Review Act*; and Richard Schultz *et al.*, *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act*.
133. Those former and present FIRA employees contacted for purposes of this study strongly rejected this assertion. The official FIRA position can be found in 'How FIRA Works', pp. 7-8.
134. This subject has been thoroughly addressed in Richard Schultz *et al.*, *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act*.
135. See Hon. Alastair Gillespie, Standing Committee on Finance, Trade and Economic Affairs, *Proceedings*, 26:7 (June 5, 1973).
136. Government of Canada, *Foreign Direct Investment in Canada* (Gray Report), p. 432.
137. Richard Schultz *et al.*, *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act*.
138. See note #104.
139. See note #105.
140. Bill C-64, *Uranium and Thorium Mining Review Act*, 3rd Session, 30th Parliament, 26-27 Elizabeth II, 1977-78.
141. David Crane, *Controlling Interest: the Canadian Gas and Oil Stakes*.
142. Hon. P.E. Trudeau, Prime Minister, *Points for an Address on Industrial Development and Resources Policy*, 28 June 1974, pp. 2-3.
143. Hon. Alastair Gillespie, House of Commons, *Debates*, 10 October 1974, pp. 308-309.
144. Note that these data exclude the coal industry. Since the foreign ownership figures for coal have traditionally been significantly above the sector's average (for example, see table 8), the reported figures understate the actual level of foreign ownership and control in the nonpetroleum mineral sector.
145. Canada, Department of Energy, Mines and Resources, *An Energy Strategy for Canada: Policies for Self-Reliance* (Ottawa: Supply and Services, 1976).
146. Officially contained within CR40-78RD.
147. Canada, Department of Energy, Mines and Resources, *The National Energy Program 1980* (Ottawa: Supply and Services, October 1980).
148. *Ibid.*, p. 18.
149. *Ibid.*, p. 19.
150. For example, David Crane, *Controlling Interest: The Canadian Gas and Oil Stakes*, p. 284, quotes Mr. J. A. Armstrong, Chairman, Imperial Oil Ltd., 'Speech to the Financial Times of London Conference', 26 March 1981, as stating: 'Coal mining is a high-risk business, and one which is relatively dependent on external financing. Investor confidence would seem a prime prerequisite for expansion of the industry. Yet given the philosophical direction of current energy policy, this would seem to be a prime candidate for NEP-style treatment.'
151. Canada, Department of Energy, Mines and Resources, *The National Energy Program 1980*, pp. 47, 49.
152. For example, in November 1981 the Government of Canada stated: 'The special measures being employed to achieve more Canadian ownership and control of the oil and gas industry are not, in the Government of Canada's view, appropriate for other sectors.' (Source: Government of Canada, *Economic Development for Canada*

in the 1980's (Ottawa: Government of Canada, 1981), p. 12.) A similar message is repeated in Canada, Department of Energy, Mines and Resources, *Mineral Policy: A Discussion Paper* (Ottawa: Supply and Services, December 1981), p. 66. Perhaps the strongest statement of the government's intentions in the nonenergy area is contained with a recent speech by Hon. Judy Erola, Minister of State for Mines, *Notes for an Address to the American Mining Congress International Mining Show*, Las Vegas, Nevada, 11 October 1982, pp. 2-3: 'The position of the Government of Canada is that the current ownership pattern in Canadian mining is highly satisfactory. Therefore, as has been stated before, there is no need for special measures to increase Canadian ownership across the board in non-energy mining'.

153. Canada, Department of Energy, Mines and Resources, *The National Energy Program 1980*, p. 49.
154. *Ibid.*, p. 50.
155. Canada, Department of Energy, Mines and Resources, *Mineral Policy: A Discussion Paper*.
156. It is noteworthy that most of this increase has occurred as a result of public ownership in Canada either through Crown corporations (such as the Potash Corporation of Saskatchewan) or through quasi-state-owned or initiated ventures such as the Canadian Development Corporation (CDC) and the British Columbia Investment Corporation (BRIC). This reemphasizes the point made in chapter 2 that public ownership is, in fact, an alternative policy instrument for achieving domestic ownership targets, in addition to its more ideologically driven objectives.
157. *Ibid.*, pp. 61, 69.
158. *Ibid.*, p. 69.
159. Gorse Howarth, Commissioner of the Foreign Investment Review Agency, *Speech to the Financial Post Conference on 'Canada's Energy Wealth: How Much for Sale?'*, New York City, 19 November 1980, pp. 1-2. Also see G. H. Dewhirst, *A Comparison of Foreign Investment Controls in Canada and Australia*, FIRA Paper No. 5 (Ottawa: Supply and Services, April 1979), p. 9.
160. Jennifer Lewington, 'Erola Planning to Visit West Germany, U.S.', *Globe and Mail*, Toronto, 21 October 1982, P (B2).
161. Gorse Howarth, Commissioner of the Foreign Investment Review Agency, *Speech to the Financial Post Conference on 'Canada's Energy Wealth: How Much for Sale?'*, p. 1.
162. *Ibid.*, pp. 1-2.
163. The procedure whereby this is accomplished is outlined in the following subsection.
164. *Ibid.*
165. David Crane, *Controlling Interest: The Canadian Gas and Oil Stakes*, pp. 284-286.
166. Government of Canada, *Foreign Direct Investment in Canada* (Gray Report), pp. 479-480.
167. According to FIRA officials, applicants are not required to enter into 'undertakings'; however, even official FIRA statement suggest otherwise: 'Commitments or undertakings by the investor are not required, but obviously they can often help to make a proposal complete, precise, and binding, thus allowing the Government to assess with greater certainty the likely effects of the investment.' ('How FIRA Works', p. 8.)
168. See Richard Schultz *et al.*, *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act*.
169. Foreign Investment Review Agency, *Press Release F-49*, 16 July 1982, pp. 4-7.
170. This is an example of an indirect takeover being subject to the review process. Prior to its acquisition by British Petroleum, Selco was exempt from the FIRA review process as long as it operated within its established and related areas of economic

activity. However, upon the sale of Selco to British Petroleum the operations of the firm came under FIRA's review. The agency was now able to extend its net by use of an 'undertaking', to cover present and future projects.

171. *Ibid.*, pp. 4-6.
172. R.B. McKern, *Multinational Enterprise and Natural Resources* (Sydney: McGraw-Hill, 1976).
173. Donald W. Barnett, *Minerals and Energy in Austria* (Sydney: Cassell Australia, 1979).
174. Quoted from *ibid.*, p. 39.
175. This follows from the tendency of foreign firms to acquire majority equity holdings in most ventures in which they are involved; hence, they display, on average, a higher control than ownership (e.g., % of shares held) ratio. Once again, see *ibid.*, p. 40, for elaboration.
176. H.W. Arndt, 'Foreign Investment', in J.P. Nieuwenhuysen and P.J. Drake, *Australian Economy Policy* (Carlton, Australia: Melbourne Univ. Press, 1977).
177. See Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia* (North Ryde, Australia: CCH Australia Limited, 1981), p. 10.
178. Quoted from H.W. Arndt, 'Foreign Investment', p. 133.
179. Quoted from *ibid.*, p. 134.
180. Quoted from Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia*, p. 11.
181. H.W. Arndt, 'Foreign Investment', p. 136.
182. Quoted from *ibid.*, p. 136.
183. Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia*, p. 13.
184. See H.W. Arndt, 'Foreign Investment', p. 137.
185. *Ibid.*, p. 137.
186. Australia, Treasury, *The Australian Financial System: Treasury Submissions to the Committee of Inquiry Into the Australian Financial System*, Treasury Economics Paper Number 9 (Canberra: Australian Government Publishing Service, 1981), p. 200.
187. Australia, Senate Select Committee on Foreign Ownership and Control of Australian Resources, *Report No. 1, October 1972* (Canberra: Commonwealth Government Printing Office, 1973), p. 5.
188. For a detailed discussion of the screening system, see Michael Sexton, 'Regulation of Direct Foreign Investment: A Case of Delayed Reaction in Australia and Canada', *Australian Business Law Review*, vol. 2, no. 4, December 1974, pp. 241-269; and Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia*.
189. *Ibid.*, p. 15.
190. *Ibid.*, p. 15.
191. Australia, *Commonwealth Parliamentary Debates, House of Representatives*, 26 September 1972, pp. 1919-20.
192. The nature and role of these consitutional powers will be discussed in chapter 5.
193. Technically, this process is rather complex and involves more than one step; for details, see Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia*, p. 99; and *Foreign Takeovers Act 1975*, s25, s26.
194. Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia*, p. 17.
195. Prime Minister's Office, News Release M1157, 30 October 1973, pp. 2-3.
196. *Ibid.*, p. 3.
197. *Ibid.*, pp. 3-4.

198. For details, see Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia*, pp. 13-14.
199. See Prime Minister's Office, Press Statement No. 266, 12 June 1974.
200. R.F.X. Connor, *Northern Territory Uranium Policy*, Canberra, 31 October 1974.
201. See Prime Minister's Office, Press Statement No. 362, 3 November 1974.
202. *Ibid.*, p. 2.
203. Hon. Frank Crean, Treasurer, *Statement on Foreign Takeovers*, Canberra, 10 December 1974
204. Note that in contrast to the Canadian approach all mineral lease acquisitions by a foreign interest are subject to review. The reader will recall that in the Canadian case, only those transactions involving proven orebodies (commercially viable) are subject to scrutiny.
205. Treasury, *The Australian Financial System*, p. 201.
206. Hon. Gough Whitlam, Prime Minister, 'Foreign Investment Policy', Press Statement No. 564, 24 September 1975.
207. *Ibid.*, p. 2.
208. *Ibid.*, p. 7.
209. *Ibid.*, pp. 7-8.
210. See *ibid.*, pp. 10-14, for a complete presentation of the mineral-specific guidelines.
211. *Ibid.*, p. 11.
212. *Ibid.*, p. 12.
213. *Ibid.*, Attachment A, p. 1.
214. *Ibid.*, Attachment A, pp. 1-2.
215. See David Flint, 'The Control of Foreign Investment in Australia 1976-1978', *Australian Business Law Review*, vol. 7, no. 2, June 1979, pp. 119-120.
216. Donald W. Barnett, *Minerals and Energy in Australia* (Sydney: Cassell Australia, 1979), pp. 291-295.
217. *Ibid.*, p. 291.
218. Hon. Phillip Lynch, Treasurer, *Foreign Investment in Australia*, Statement to the House of Representatives, Canberra, Australia, 1 April 1976.
219. Since this study was written, the Fraser government was defeated in the March 1983 federal general election. The new ALP government, under the leadership of Bob Hawke, has, as of 30 April 1983, not yet made any material changes to the system described herein as the 'current' scheme. This issue will be addressed in greater depth in chapter 6.
220. See chapter 6 for details.
221. Hon. Phillip Lynch, Treasurer, *Foreign Investment in Australia*.
222. Hon. John Howard, Treasurer, 'Review of Foreign Investment Policy and Exchange Control Procedures Impinging on Capital Inflow', Statement to the House of Representatives, Canberra, Australia, 8 June 1978.
223. Hon. John Howard, Treasurer, 'Foreign Investment in Uranium – Yeelirree Uranium Project', Press Release No. 46, Canberra, 10 June 1979.
224. Hon. John Howard, 'Foreign Investment Policy', 20 January 1982, reprinted in Foreign Investment Review Board, *1982 Report* (Canberra: Australian Government Publishing Service, 1982), pp. 74-79.
225. See note #219.
226. Australia, Treasury, *Australia's Foreign Investment Policy: A Guide for for Investors 1981* (Canberra: Australian Government Publishing Service, 1982).
227. Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia* (North Ryde, Australia: CCH Australia, 1981).
228. Hon. Phillip Lynch, Treasurer, *Foreign Investment in Australia*, p. 1.
229. *Ibid.*, p. 2.

230. *Ibid.*, p. 13.

231. Hon. P.E. Trudeau. Notes for Remarks to the Toronto Ad and Sales Club. Toronto. 12 February 1980. pp. 9-10.

232. Technically the board was to have between 3 and 5 members: however, only the lower limit has been employed throughout the operational life of the FIRB.

233. For example, see Hon. Phillip Lynch, Treasurer, 'Foreign Investment Review Board'. Press Release No. 69. Canberra, 8 April 1976, p. 3.

234. Australia. Treasury. *Australia's Foreign Investment Policy: A Guide for Investors*, p. 3.

235. G.H. Dewhurst. *A Comparison of Foreign Investment Controls in Canada and Australia*. FIRA Paper No. 5 (Ottawa: Supply and Services, April 1979), p. 5.

236. The $2-million threshold is purely an *administrative* threshold and does not exempt a foreign person from the notification requirements of the Foreign Takeovers Act. It is the practice of the government, however, not to intervene in small proposals of this nature except where special circumstances exist or where they fall within certain restricted areas. This administrative threshold applies generally to the minerals sector, although not to uranium.

237. Australia. Treasury. *Australia's Foreign Investment Policy: A Guide for Investors*, p. 4.

238. For a detailed discussion of the constitutional powers upon which the guidelines rest, see Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia*, ch. 3. A thorough presentation of the government's export control powers can be found in R.P. Maxwell, 'Export Approvals', paper presented to the seminar on Government Approvals for Mining Projects in New South Wales – the Law and Practice, arranged by the Australian Mining and Petroleum Law Association (NSW Branch), 26 March 1982.

239. Hon. Phillip Lynch, Treasurer, *Foreign Investment in Australia*, Attachment, p. 4.

240. Australia. Treasury. *Australia's Foreign Investment Policy: A Guide for Investors*, pp. 6-7.

241. Notwithstanding this statement, it is apparently not the practice under Australia's foreign investment policy to impose performance requirements on the parties to a proposal as part of the approval process. The conditions applied by the Treasurer generally relate to the introduction of Australian equity, taxation requirements (*re* transfer pricing controls), and conditions on the resale of property to Australians.

242. For discussion of the evolution of the rules in these areas, see *ibid.*, pp. 10-12; and Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia*, pp. 13-14.

243. Hon. Phillip Lynch, Treasurer, *Foreign Investment in Australia*, p. 8.

244. See p. 65.

245. Hon. John Howard, Treasurer, 'Foreign Investment in Uranium – Yeelirree Uranium Project'.

246. Australia. Treasury. *Australia's Foreign Investment Policy: A Guide for Investors*, pp. 12, 13.

247. *Ibid.*, pp. 12.

248. See p. 65 for an elaboration.

249. See p. 65 for details on the Whitlam guidelines.

250. Australia. Treasury. *Australia's Foreign Investment Policy: A Guide for Investors*, p. 12.

251. *Ibid.*, pp. 9-10.

252. Australia. *Treasury. Your Investment in Australia: A Guide for Investors 1981* (Canberra: Australian Government Publishing Service, 1981), p. 15.

253. Strictly speaking, the policies discussed in this chapter are those developed by the Fraser government. On 3 March 1983 this regime was defeated in a general election by the Australian Labor Party (ALP) under the leadership of Bob Hawke. At the time of final editing, early May 1983, the new government had announced only one major change to the prior FDI/mineral sector policy: the ALP will attempt to enforce its uranium ownership policy which was first ennunciated in 1977. That is, future development of all deposits discovered prior to 1977 must be 75 percent Australian owned (no exceptions) and orebodies found since then require 100 percent Australian ownership prior to the granting of development permits. For a recent news report on this issue see *Economist*, vol. 287, no. 7288, 7 May 1983, pp. 74-75.
With the exception of the uranium sector, it is unlikely that the new government will change the mineral sector rules to any extent; in fact, it is probable that the rules for this sector will serve as the basis of a new policy for other sectors. For example, the *Economist*, 26 February 1983, p. 74, states:

> Labor wants at least 50 percent Australian ownership, not just in mineral projects (which the government of Mr. Malcolm Fraser has insisted on too) but also in new investments in other industries.

This supposition is further supported by the fact that while the Treasurer, Mr. Keating, was announcing the rejection of a number of nonmineral FDI applications, he had approved (up to 12 May 1983) all of the mineral-related applications for which decisions had been released. For example, see Hon. P.J. Keating, Treasurer, 'Granting of Naturalised Status to Comalco Limited', Press Release 20, 12 May 1983; and Hon. P.J. Keating, Treasurer, 'Acquisitions of Interests in Cook Colliery By Pohang Iron and Steel Corporation Limited and Ssangyong Corporation', Press Release 19, 10 May 1983.
In the nonmineral area, the announcements to date indicate that the Hawke government will attempt to monitor transfer pricing more rigorously, especially with respect to oil and bauxite/alumina firms (see David Uren, 'Tax Office to Pursue Schemes Overseas', *Age*, Melbourne, 13 April 1983, p. 27); and an indication that the national benefit test is being more rigorously applied to FDI in the manufacturing and distribution (e.g., pipelines) sectors. For details, see Terry Ingran, 'Foreign Equity Rules Tighten', *Australian Financial Review*, 20 April 1983, p.1; Paul Malone, 'Foreign Investment Policy Review', *Australian Financial Review*, 6 May 1983, p. 1; and Michael Thompson-Noel, 'Foreign Investors facing New Obstacles in Australia', from Financial Times of London, as reprinted in *Globe and Mail*, Toronto, 16 May 1983, p. B.10.

254. See Australia, Foreign Investment Review Board, *1982 Report* (Canberra: Australian Government Publishing Service, 1982), p. 20.

255. For a discussion of the present-day decision process, see Foreign Investment Review Board, *1982 Report*, chapter 5.

256. For example, see E.J. Crough and E.L. Wheelwright, 'Australia the Client State: A Case Study of the Mineral Industry', in Elizabeth J. Harman and Brian W. Head, editors, *State, Capital and Resources in the North and West of Australia* (Perth: University of Western Australia Press, 1982), p. 90; M.J. Price and D.J. White, 'Australian Foreign Investment Policy: Description, Evaluation and Recommendations', in *Australian Studies of Transnational Corporations: Collected Student Papers, Volume II* (Sydney: Transnational Corporations Research Project, University of Sydney, 1982), p. 11; and Humphrey McQueen, *Gone Tomorrow: Australia in the 80's* (Sydney: Angus and Robertson Publishers, 1982), p. 65.

257. Humphrey McQueen, *Gone Tomorrow: Australia in the 80's*, p. 6.

258. Australia, Foreign Investment Review Board, *1981 Report*, pp. 3-4.

259. See Foreign Investment Review Board, *1982 Report*, p. 20.

260. The major example, according to many observers, of the Fraser government failing to live up to its 50/50 rule is the case of the Norwich Park coal mine in Queensland. However, this exception occurred prior to 1 April 1976. For details, see Garth Stevenson, *Mineral Resources and Australian Federalism* (Canberra: Centre for Research on Federal Financial Relations, Australian National University, 1976), pp. 57-58.

261. This estimate is based on data provided by: Hon. John Howard, Treasurer, *Notes for Speech*, Address to the Economic Society of Australia and New Zealand (NSW Branch), Wentworth Hotel, Sydney, 22 May 1981, p. 7; Foreign Investment Review Board, *1981 Report*, p. 19; and Foreign Investment Review Board, *1982 Report*, p. 21.

262. Hon. John Howard, *Notes for Speech*, Address to the Economic Society of Australia and New Zealand (NSW Branch), p. 7.

263. Foreign Investment Review Board, *1982 Report*, p. 21.

264. This estimate is based the same sources listed in footnote 9. In the speech by the then Treasurer, Mr. Howard, it is noted that two such cases occurred between 1 April 1976 and 31 March 1981. A review of the 1981 and 1982 FIRB annual reports and a review of FIRB press releases failed to reveal any significant coal-related takeovers during the July 1980 to June 1982 period which left Australians holding less than 50 percent of the equity.

265. Hon. John Howard, *Notes for Speech*, Address to the Economic Society of Australia and New Zealand (NSW Branch), p. 7.

266. For details, see pp. 100-102.

267. M.J. Price and D.J. White, 'Australian Foreign Investment Policy: Description, Evaluation and Recommendations', p. 8.

268. Foreign Investment Review Board, *1982 Report*, p. 67.

269. This statement is based on two sources of data. First, Hon. John Howard, Treasurer, *Foreign Investment Policy*, 20 January 1982, reprinted in Foreign Investment Review Board, 1982 Report, p. 74, states:

> Experience over recent years has shown that natural resource projects are satisfying the Australian equity participation guidelines. In 1979-80 and 1980-81, the 14 projects approved provided either for at least the guideline level of Australian equity at the outset, or have undertaken to meet it before production commences.

Second, the Foreign Investment Review Board, *1982 Report*, p. 20 states:

> Thirteen new mineral development projects were examined by the Board during the year, all of which were approved either on the basis that they already satisfied, or on condition that they would satisfy before production commenced, the Government's Australian participation guidelines.

270. Such views are contained in G.J. Crough and E.L. Wheelwright, 'Australia the Client State: A Case Study of the Mineral Industry'; M.J. Price and D.J. White, 'Australian Foreign Investment Policy: Description, Evaluation and Recommendations'; Humphrey McQueen, *Gone Tomorrow: Australia in the 80's*; and Peter Loveday, *Promoting Industry: Recent Australian Political Experience* (St. Lucia, Queensland: University of Queensland Press, 1982), pp. 110, 112.

271. Hon. Phillip Lynch, Treasurer, 'Foreign Investment in Australia', Statement to the House of Representatives, Canberra, Australia, 1 April 1976.

272. *Ibid.*, p. 9.

273. See p. 65 for details.

274. Refer to pp. 76-78 for elaboration.

275. For example see Australian Labor Party, *Foreign Investment: Labor's Policy*, Canberra, September 1980; and Australian Labor Party, *National Issues Relating To Rapid Expansion of Mineral Production During the Eighties*, Canberra, May 1982.

276. Details of the scheme are provided on pp. 79-81.

277. For a thorough discussion of the issue see Susan Bambrick, *Australian Minerals and Energy Policy* (Canberra: Australian National University Press, 1979), pp. 180-185; Humphrey McQueen, *Gone Tomorrow: Australia in the 80's*, ch. 4; and Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia* (North Ryde, Australia: CCH Australia, 1981), pp. 131-135.

278. Details of the controversy can be found in Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia*, p. 132.

279. Hon. John Howard, Treasurer, 'Review of Foreign Investment Policy and Exchange Control Procedures Impinging on Capital Inflow', Statement to the House of Representatives, Canberra, Australia, 8 June 1978.

280. For details, see Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia*, p. 135; and H. M. Thompson, 'The Devil's Pebbles: Diamonds in the Kimberley', in Elizabeth J. Harman and Brian W. Head, editors, *State, Capital and Resources in the North and West of Australia* (Perth: University of Western Australia Press, 1982), pp. 277-297.

281. The defenders of the scheme point out that the system will eventually lead to majority Australian ownership, and perhaps control, of foreign-owned major Australian-based companies. The flag-ship at the present time is obviously CRA Ltd.

282. These numbers are approximations only since the ownership structure of the Ashton Joint Venture (AJV) has changed slightly over time and since the 'actual' level of Australian ownership in CRA has also increased since 1979. Nevertheless, the following figures provide a reasonable presentation of the impact of the naturalization process.

I assume that 52.5, 38.2, 5.0, and 4.3 percent of the AJV was, in 1979, owned by CRA, Ashton Mining N.L., Northern Mining Corporation and others, respectively. Initially the corresponding proportion of Australian ownership in each of these interests was deemed to be 30, 39.7, 100, and 0 percent; this generates a weighted average Australian ownership figure of 36 percent for AJV. The granting of naturalizing status to CRA increased its deemed Australian ownership level to 51 percent; the new set of weights now yields a 48-percent Australian ownership figure for the AJV. Similarly, after Ashton Mining N.L. received naturalizing status, the level of Australian ownership climbed to 54.5 percent.

The data employed above obtained from: Hon. John Howard, Treasurer, 'Granting Naturalising Status to Ashton Mining N.L.', Press Release 19, Canberra, 6 February 1981; H.M. Thompson, 'The Devil's Pebbles: Diamonds in the Kimberley', pp. 281-283; Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia*, p. 135; and Susan Bambrick, *Australian Minerals and Energy Policy*, p. 183.

283. See H.M. Thompson, 'The Devil's Pebbles: Diamonds in the Kimberley', pp. 280-281.

284. Hon. John Howard, Treasurer, 'Review of Foreign Investment Policy and Exchange Control Procedures Impinging on Capital Inflow', Statement to the House of Representatives, Canberra, Australia, 8 June 1978, p. 7.

285. See Susan Bambrick, *Australian Minerals and Energy Policy*, p. 184.

286. Further information is provided by Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia*, pp. 134-135. It is interesting to note that public concern over CRA's acquisition of shares in Hamersley Holdings Limited was such that the Treasurer responded directly:

There has been some public comment that moves of this kind are not in accordance with the Government's view that companies undertaking naturalization under the provisions of foreign investment policy should do so primarily by way of new share issues to Australians to fund new projects and expansions rather than by way of takeovers and acquisitions of existing businesses. This objective is not intended, however, to preclude naturalising companies from seeking approval of takeovers or corporate reorganizations which are considered to be fully in conformity with the Government's foreign investment policy requirements.
(Source: Hon. John Howard, Treasurer, 'Acquisition By CRA Limited of Shares in Hamersley Holdings Limited', Press Release 72, 6 May 1981.)

287. Peter Loveday, *Promoting Industry: Recent Australian Political Experience*, p. 110.
288. Hon. John Howard, 'Australian Foreign Investment Policy', 20 January 1982, p. 7.
289. Foreign Investment Review Board, *1982 Report*, p. 66.
290. Bruce McKern, 'Overseas Investment in Resources', in Stuart Harris and Geoff Taylor, editors, *Resource Development and the Future of Australian Society* (Canberra: Centre for Resource and Environmental Studies, Australian National University, 1982), pp. 211-214.
291. *Ibid.*, p. 213.
292. Hon. John Howard, Treasurer, 'Foreign Investment in Uranium – Yeelirrie Uranium Project', Press Release 46, 10 June 1979.
293. *Ibid.*, pp. 2-3.
294. See Hon. Eric L. Robinson, Acting Treasurer, 'Foreign Investment in the Olympic Dam Project', Press Release 103, Canberra, 9 October 1979.
295. Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia*, pp. 136-138.
296. In May 1982, Esso pulled out of the project; at the time of writing, WMC had not yet restructured the operation. Indeed, there is some doubt that the project will be developed within the next several years, given current market conditions.
297. Hon. John Howard, Treasurer, 'Foreign Investment in Uranium – Yeelirree Uranium Project', p. 3.
298. The inclusion of certain non-equity type arrangements in the calculation of Australian equity for purposes of the guidelines does not preclude such arrangements from being utilized. What it does is to take them into account when calculating the level of Australian ownership: e.g., if a prepayment arrangement is deemed to be equivalent to a 10-percent equity interest, the foreigners could only hold up to a 40-percent direct interest in the project.
299. For instance, see Australian Mining Industry Council, *Policy 82* (Canberra: Australian Mining Industry Council, 1982), p. 8.
300. The Norwich Park coal mine in Queensland was also the source of controversy with respect to foreign participation. However, this occurred prior to 1 April 1976. For details, see Garth Stevenson, *Mineral Resources and Australian Federalism* (Canberra: Centre for Research on Federal Financial Relations, Australian National University, 1976), pp. 57-58.
301. For example, see Michael Sexton and Alexander Adamovich, *The Regulation of Foreign Investment in Australia*, p. 124; M.J. Price and D.J. White, 'Australian Foreign Investment Policy: Description Evaluation and Recommendations', p. 9; and Ted Wheelwright, 'The Political Economy of Foreign Domination', in Robert Birrell, Doug Hill and John Stanley, editors, *Quarry Australia: Social and Environmental Perspectives on Managing the Nation's Resources* (Melbourne: Oxford University Press, 1982), pp. 44-58.

302. The validity of the economic rent rationale for FDI controls has been questioned by Ben Smith, 'Resource and Australian Economic Development', in F.H. Gruen, *Surveys of Australian Economics*, vol. III, (Sydney: George Allan and Unwin, 1983), pp. 109-110. Nevertheless, he does state that if there are a limited number of potential buyers, then rents may indeed to be transferred by the current scheme. Although Smith's arguments are relevant, it must be stressed that there are many other factors, in addition to theoretical economics, that must be taken into account by political decision makers. Perhaps the most important are the economic patriotism arguments previously advanced: many people suffer disutility if they perceive foreign interests to be unduly gaining, whether it be from the apparent appropriation of economic rents or even the mere capture of a normal profit. These concerns must be addressed by a 'rational' politician since they present a geniune dimension of public interest.

303. For example, see Hon. John Howard, 'Australian Foreign Investment Policy', 20 January 1982, p. 3.

304. Australia, Treasury, 'Prospective Investment in Resource-Based Developments: Some Implications for the Economy and Economic Policy', Canberra, mimeo, May 1980, p. 18.

305. *Ibid.*, p. 16.

306. For details, see Australia, Senate Standing Committee on Natural Resources, *The Development of the Bauxite, Alumina and Aluminium Industries* (Canberra: Australian Government Publishing Service, 1981), pp. 1-3.

307. *Ibid.*, p. 2.

308. *Ibid.*, p. 2.

309. For details, especially within the Australian context, see Ben Smith, editor, *Taxation of the Mining Industry: Papers Presented to a Workshop on Mining Industry Taxation*, Working Paper R/GP 12 (Canberra: Centre for Resource and Environmental Studies, Australian National University, 1979).

310. See John Cohen and Michael Krashinksy, 'Capturing the Rents on Resource Lands for the Public Landowner: The Case for a Crown Corporation', *Canadian Public Policy*, vol. 2, Summer, 1976, pp. 411-423.

311. The ALP's position on resource rent taxes can be found in Australian Labor Party, *National Issues Relating to Rapid Expansion of Mineral Production During the Eighties*, pp. 47-49, 52.

312. It must be stated that the federal and some state governments have attempted to capture economic rents; however, they have generally done so through either non-neutral taxes (such as the coal and crude oil levy) or the capture of monopoly profits generated by 'excessive' freight charges on coal transported by the state railways. For details, see Don Barnett, *Minerals and Energy in Australia* (Sydney: Cassell Australia, 1979), pp. 307-311.

313. Australia, Treasury, 'Prospective Investment in Resource-Based Developments: Some Implications for the Economy and Economic Policy, p. 17.

314. For details, see Garth Stevenson, *Mineral Resources and Australian Federalism*, chs. V, VI; and Susan Bambrick, *Australian Minerals and Energy Policy*, pp. 170-178.

315. See Peter Loveday, *Promoting Industry: Recent Australian Political Experience*, ch. 9.

316. Australia, Treasury, 'Prospective Investment in Resource-Based Developments: Some Implications for the Economy and Economic Policy', p. 16.

317. In the federal general elections of 1980 and 1983, the issue of FDI regulation was not a major political concern to any of the three major parties. For example, see

Michael Thompson-Noel. 'Foreign Investors Facing New Obstacles in Australia'. *Globe and Mail*. Toronto. 16 May 1983. p. B10.

318. For details. see Michael Sexton and Alexander Adamovich. *The Regulation of Foreign Investment in Australia*. p. 129: and Hon. John Howard. 'Address to the Economic Society of Australia and New Zealand (NSW) Branch)'. Press Release 87. p. 8.

319. Australia. Senate Standing Committee on National Resources. *The Development of the Bauxite. Alumina and Aluminium Industries*. pp. 31-32.

320. This observation is based on comments made to the author by a few corporate and government officials during interviews conducted for this study. The statements were of the form of personal opinions rather than documented positions: nevertheless. it does suggest that the small size of the Australian financial community. especially with respect to large projects. could lend itself to noncompetitive behaviour.

321. As previously noted. the ALP. under the leadership of Mr. Bob Hawke. are now the governing party. For further details. see note #253.

322. Australian Labor Party. *Foreign Investment: Labor's Policy*. September 1980. pp. 1-4.

323. *Ibid*., pp. 6-7.

324. *Ibid*., p. 10.

325. *Ibid*., p. 10. Since coming to power in March 1983. ALP has indicated that it intends to quickly implement this policy: for details. see *Economist*. vol. 287. no. 7288. 7 May 1983. pp. 74-75.

326. Australian Labor Party. *National Issues Relating to Rapid Expansion of Mineral Production During the Eighties*.

327. Australian Mining Industry Council. *Policy 82*.

328. *Ibid*., p. 8.

329. *Ibid*., p. 8.

330. *Ibid*., p. 8.

331. Australia. Treasury. *Resource Development: Maximizing Opportunities*. Treasury Economic Paper No. 8. Submission to the Senate Standing Committee on Natural Resources: The Development of the Bauxite. Alumina and Aluminium Industries (Canberra: Australian Government Publishing Service. 1981). p. 21.

332. Susan Bambrick. *Australian Minerals and Energy Policy*. p. 184.

333. Gordon Jackson. 'A Mining Industry Perspective'. in Stuart Harris and Geoff Taylor. *Resource Development and the Future of Australian Society*. p. 54.

334. See H.W. Arndt. 'Foreign Investment'. in J.P. Nieuwenhuysen and P.J. Drake. editors. *Australian Economic Policy* (Carlton. Australia: Melbourne University Press. 1977). p. 136.

335. Even though the Fraser government lost the March 1983 federal election. FDI policy was not a significant issue in the campaign of any of the three major parties.

336. See note #312 for a qualification to this statement.

337. Of course, the reverse could take place. The superior marketing skills of the MNE may allow it to obtain a superior return both for itself and for the host country (through the tax system).

338. Australia. Foreign Investment Review Board. *1981 Report*. p. 20.

339. In 1982. FIRB gave conditional foreign investment approval to the Jabiluka project. subject to the parties' satisfying the government's 75-percent-equity guidelines by the time production commences (see. Foreign Investment Review Board. *1982 Report*. pp. 21-22).

The Getty Oil Company currently holds a 35-percent interest in the Jabiluka Project. Since it is wholly owned by foreign (U.S.) interests. it must divest itself of approximately one third of its holdings if it is to conform with the spirit of the guidelines.

If customer equity is to be brought into the venture, Getty must sell even a larger proportion of its interest.

340. The initial request was outlined by Hon. John Howard, Treasurer, in 'Proposed Investment by the Shell Company of Australia Limited in the Theodore and Callide Projects', Press Release 151, 12 August 1981. The company's response was contained in a joint press release issued by the Treasurer, Hon. John Howard, and Kevan Gosper, Chairman and Chief Executive, Shell Group of Companies, 'Shell-Australian Participation', Press Release 172, Canberra, 17 September 1981.

341. Hon. John Howard, 'Australian Foreign Investment Policy', 22 January 1982, p. 3.

342. Australia, Foreign Investment Review Board, *1981 Report*, p. 21.

343. *Ibid.*, p. 21.

344. Public ownership policies could also be pursued; however, they have limitations similar to those listed for taxation.

345. For a thorough discussion of the issue, see Australia, Foreign Investment Review Board, *1981 Report*, ch. 5.

346. Australian Labor Party, *Foreign Investment: Labor's Policy*, September 1980, p. 10.

347. Donald W. Barnett, *Minerals and Energy in Australia*, pp. 296-297.

348. The government itself admits that problems exist as evidenced by its recent efforts to amend Section 136 of the Income Tax Act. In addition, one finds the Treasury stating: 'Substantial, independent Australian participation is one means of attempting to ensure arm's-length pricing for bauxite and alumina for taxation and other purposes' (Treasury, *Resource Development: Maximizing Opportunities*, p. 21). Perhaps the most thorough criticism of tax system, with respect to transfer pricing issues, is provided by G.J. Crough, *Taxation, Transfer Pricing and the High Court of Australia: A Case Study of the Aluminium Industry* (Sydney: Transnational Research Project, University of Sydney, 1981).

349. In fact, during the resources boom of 1979 to 1982, it appears that the Fraser government may have used its FDI/regulatory regime as a quasi-stabilization tool. For example, the then Prime Minister, Mr. Fraser, stated in June 1981:

> We want more and more development but the rate at which development gathers pace is very important in terms of economic management and in terms of our capacity to restrain inflationary pressures. If the resource area was going to push forward too hard, too fast, then there are various things that governments could do to modify that. One of the very simple ways, and in a sense I think it is happening, would be a slightly firm view of the Foreign Investment Review Board. That in itself can be a moderator through greater insistence on Australian equity, Australian partnership.
>
> Source: Interview with Malcolm Fraser, 'A Rare Insight into Malcolm Fraser', *The Bulletin*, 16 June 1981, pp. 24-34.

350. Bruce McKern, 'Overseas Investment in Resources', in Stuart Harris and Geoff Taylor, editors, *Resource Development and the Future of Australian Society*, pp. 211-214.

351. Note that the Australian Labor Party and other critics frequently advocate the extension of the 50/50 rule to other sectors of the economy; by doing so, they implicitly support the current approach towards the regulation of FDI in the mineral sector.

352. In the first two months after assuming office in early March 1983, the Hawke government has made only minor changes to the manner in which FDI is regulated. These initiatives were to start to monitor more closely any transfer pricing activities on the part of MNEs dealing in oil and bauxite/alumina (see David Uren, 'Tax Office to Pursue Schemes Overseas', *Age*, Melbourne, 13 April 1983, p. 27) and to enforce

more rigorously the national interest test in the manufacturing sector (see Terry Ingran. 'Foreign Equity Rules Tighten'. *Australian Financial Review*. 20 April 1983. p. 1. respectively. In fact. based on the ALP policy papers discussed previously in this chapter and on press reports (for example. see the *Economist*. 26 February 1983. p. 74). it would appear that the new government is unlikely to change the FDI/mineral sector rules. Instead. it is probable that these regulations will be extended to other areas of the economy.

353. For a descriptive comparison of the administrative aspects of the Canadian and Australian schemes. see Gordon Dewhurst. *A Comparison of Foreign Investment Controls in Canada and Australia*. FIRA Paper No. 5 (Ottawa: Supply and Services. April 1979). A somewhat legalistic discussion of the initial attempts by each domain to regulate FDI is presented by Michael Sexton. 'Regulation of Direct Foreign Investment: A Case of Delayed Reaction in Australia and Canada'. *Australian Business Law Review*. vol. 2. no. 4. December 1974. pp. 241-269. For a political economy perspective of the origins of FDI controls in each domain. see Garth Stevenson. *The Control of Foreign Direct Investment in a Federation: Canadian and Australian Experience* (Sydney: Transnational Corporations Research Project. University of Sydney. 1976).
354. References will not be given. in most cases. for information in this chapter that has been discussed previously in the text.
355. See Thomas Walkom. 'Ottawa Quietly Debating Changes for FIRA'. *Globe and Mail*. Toronto. 20 November 1982. p. 11.
356. See Gordon Dewhurst. *A Comparison of Foreign Investment Controls in Canada and Australia*. p. 5.
357. Richard Schultz *et al*.. *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act*. Working Paper No. 6. Regulation Reference (Ottawa: Economic Council of Canada. 1980). p. 46.
358. The term in quotations appears in the current guidelines.
359. *Foreign Investment Review Act*. S.C. 1973-74. c.46. S.2(2).
360. Note that all major oil and gas projects on Canada Lands are subject to a minimum 50 percent Canadian ownership requirement. For details. see p. 68.
361. For a discussion of this important issue. see pp. 75-79.
362. See p. 23 for details.
363. Only one element of the naturalization process is discussed here: the naturalizing phenomenon. The remaining component. the granting of 'naturalized' status to designated firms. is of lesser importance with respect to this study.
364. For a clear expression of this view see Hon. Marc Lalonde. Minister of Energy. Mines and Resources. *Economic Nationalism in Canada: Fact and Fancy*. Remarks for Panel on Canadian Economic Nationalism. IMF/IBRD Meetings. Toronto. 8 September 1982. pp. 2-3.
365. Perhaps the best example of this is the aggressive manner in which the Department of Finance sought to promulgate the 'true' reality of FIRA to delegates at the IMF/World Bank Meetings in Toronto in September 1982. For individual ministerial speeches illustrating the 'open for investment subject to restrictions' mentality. see Hon. Herb Gray. Minister Responsible for the Foreign Investment Review Act. Remarks for a Speech to Americas Society Conference. 'Canada-United States: The Foreign Investment Issue'. New York City. 30 September 1982; Hon. Marc Lalonde. Minister of Finance. Remarks at the Meeting of the Canadian Society of New York. New York City. 14 October 1982; and Hon. Judy Erola. Minister of State for Mines. Notes for an Address to the American Mining Congress International Mining Show. Las Vegas. Nevada. 11 October 1982.

366. See James Rusk. 'FIRA to be Revised. U.S. Executives Told'. *Globe and Mail*. Toronto. 21 October 1982. p. 1.

367. 'Canada-U.S. Relations Improve'. *Leader-Post*. Regina. 17 November 1982. p. A16.

368. For details. see note #131.

369. Due to time and space constraints. and the general as opposed to mineral-specific applicablity of the problems. I have ignored the issues of: threshold rates used to establish an initial presumption of a change in control: qualifications of employees: and the use of legislation as opposed to general policy pronouncements in establishing the regulatory framework.

370. This statement is admittedly based on casual empiricism. On the other hand. it appears as if the Fraser government. in the last year or two of its tenure in office. started to place more emphasis on. at least. the 'cosmetics' of consultation. For example. see Foreign Investment Review Board. *1982 Report*. pp. 52-53.

371. For details. see Michael Sexton and Alexander Adamovich. *The Regulation of Foreign Investment in Australia* (North Ryde: CCH Australia Ltd.. 1981) pp. 188-196; and Michael Sexton. 'Foreign Investment Under a Labor Government'. a paper delivered at the National Conference of the Australian Society of Labor Lawyers. Canberra. 3 July 1982. pp. 12-13.

372. For example Stephen Clarkson. *Canada and the Reagan Challenge* (Ottawa: Canadian Institute for Economic Policy. 1982). p. 160. states: 'Since the federal government amended the Export and Import Permits Act in 1974 to allow export controls to be implemented. Canada has created a policy instrument that can be used in the future whenever increasing American dependence on foreign sources given Canada greater leverage to achieve further processing before export.'

373. This study covers related events up to December 1982.

374. See Jennifer Lewington. 'FIRA's Chief Will Soften Investor Rules'. *Globe and Mail*. Toronto. 30 November 1982. p. B1.

375. For example. at the November 1982 National Liberal Party Policy Convention. delegates passed a motion recommending. among other things. a key-sector approach towards the regulation of foreign direct investment. See. 'FIRA's Rejections are Halved. Proposals handled Doubled'. *Globe and Mail*. Toronto. 9 November 1982. p. B6.

376. As quoted from Jennifer Lewington. 'Erola Planning to Visit West Germany. U.S.'. *Globe and Mail*. Toronto. 21 October 1982. p. B2.

377. There are two major differences that have not received adequate attention to this point and which may reduce the feasibility of employing the proposed FDI regulatory system. They are the proximity of Canada to the United States and the dominant position of the United States as an investor in Canada. Given the philosophical objection of the U.S. government. particularly under the Reagan regime. to restrictions on the free flow of international capital. the above-noted factors tend to make Canada rather vulnerable to U.S. criticism. However. these constraints on Canada's independence must be looked at in the context of the adverse reaction generated by the current system versus the expected opposition to the proposal plan. For a comprehensive discussion of the role of FDI policy in the development of U.S./Canada relations. see Stephen Clarkson. *Canada and the Reagan Challenge*. (Ottawa: Canadian Institute for Economic Policy. 1982). chs. 1. 4 and 6.

378. This does not mean that every single potential new mine must be subjected to review; instead. it means that all new mines which involve foreign interests (or in Canadian parlance. noneligible persons) will be subjected to review. For details. the reader is referred to chapter 5.

379. See chapter 2 for details.

380. For a brief description of the initial rules, see O.J.C. Runnalls, *Ontario's Uranium Mining Industry – Past, Present, and Future*, Ontario Mineral Policy Background Paper No. 13 (Toronto: Ministry of Natural Resources, 1981), pp. 4-5.

381. A difficult problem which is ignored here is whether or not such agreements should contain a 'do-ability' or a commercial viability clause. To the industry, this is a rational approach; unfortunately the government is caught in a difficult position since the critics view such a condition as an 'escape' clause.

382. Interestingly, Australia is Canada's major international rival.

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